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No. 08-1188

Supreme Court, U.S.
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In the
# Supreme Court of the United States

Gerald Robinson,

Petitioner,

v.

State of Ohio,

Respondent.

**On Petition for a Writ of Certiorari to the Ohio Court of Appeals for the Sixth Appellate District**

## Petition for a Writ of Certiorari

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## Question Presented

If due process of law means anything in a criminal case, it is protection of the individual from arbitrary government action, and the right of the accused to present evidence that undermines the credibility of the Government's case. In the 24 years of unjustifiable pre-prosecution delay in this case, expert witness testimony, occurrence witness testimony, forensic evidence and physical evidence, probative of actual innocence, was lost. Did Petitioner suffer actual prejudice at trial?

If the answer is "yes," then his due process claim was ripe for adjudication, under the first prong of the test announced in *United States v. Lovasco*, 431 U.S. 783 (1977). Accordingly, the Ohio appellate court should have adjudicated the claim by examining the legitimacy of this prosecution, under the second prong of the *Lovasco* test, to determine if the state of Ohio violated Petitioner's Due Process Rights.

## Parties to the Proceeding

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## Petition for a Writ of Certiorari

Petitioner, Gerald Robinson, respectfully submits this petition for a writ of certiorari to review the judgment of the Ohio Court of Appeals for the Sixth Appellate District.

### Opinions Below

The opinion of the Ohio appellate court in *State of Ohio v. Gerald Robinson*, 2008-Ohio-3498 (Jul. 11, 2008), is not yet published but is electronically reported at 2008 WL 2700002. Pet. App. A-1. The opinion of the Lucas County, Ohio Court of Common Pleas is unreported. *Id.* at B-1.

### Jurisdiction

The Ohio Supreme Court declined to accept jurisdiction to hear this case on December 31, 2008. *Id.* at D-1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

### Constitutional Provisions Involved

The Fourteenth Amendment of the Constitution provides in relevant part: . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law. U.S. Const., amend. XIV., § 1.

The Fifth Amendment of the Constitution provides in relevant part: . . . [N]o person shall be . . . deprived of life, liberty, or property, without due process of law. U.S. Const., amend. V.

The Sixth Amendment of the Constitution provides in relevant part: . . . In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him, [and]

to have compulsory process for obtaining witnesses in his favor. U.S. Const., amend. VI.

## Statement

Our fundamental concepts of justice clash head-on with the Government's interest in pursuing "cold" criminal cases when the passage of time impairs a defendant's ability to present of a rational theory of innocence to a jury. We ask this Court to revisit *United States v. Lovasco*, 431 U.S. 783 (1977), and strike the appropriate constitutional balance between the two competing interests, particularly important in the technological climate of today, by addressing the threshold due process question unanswered 32 years ago – when, in *Lovasco's* terms, is a pre-prosecution delay claim "ripe for adjudication?"[1] The answer to the question presented, especially in a circumstantial case like this one, requires a delicate application of the correct constitutional standard. This Court, as the final arbiter of our Constitution, must set that standard.

### *A Questionable Motive*

1. The Lucas County, Ohio Prosecutor's renewed interest in this 1980 case occurred during the height of the politically driven, salacious, media-circus atmosphere of the Catholic Clergy child sexual abuse and cover up scandals of 2003.[2]

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[1] *Id.* at 790.

[2] This case was denominated by local and national media as Toledo's "crime of the century." And because the state of Ohio linked Catholicism to the occult, *see* pp. 13-15, the trial was covered live on Court TV.

Prompted only by a letter accusing Catholic Priests and others of satanic, ritualistic, child sexual abuse, detectives re-opened the investigation of the April 5, 1980 murder of an elderly Catholic Nun, Sister Margaret Ann Pahl, and set out to develop a contemporary Catholic occult theory of the case. Pet. App. A-14, A-15 at ¶ 29. On May 3, 2004 – 24 years after the homicide of Sister Pahl – the State indicted Petitioner, Father Gerald Robinson. *Id.* A-2 at ¶ 2.

*An Incredible Theory*

The State's "cold-case" theory was that a meek, mild mannered, Polish Catholic Priest, abandoned his lifetime commitment to his God to commit an occult-driven, ritualistic, sadomasochistic, murder in the presence of the Holy Eucharist on one of the holiest days on the Catholic calendar – Holy Saturday. *Id.* A-98 at ¶ 230. According to the prosecutors, because Father Robinson had previously expressed a desire to be a military chaplain, he was unsatisfied with the highest calling of the Priesthood – counseling the sick and dying. *Id.* A-37 at ¶ 81. Thus, they claimed he carried his letter opener[3] from his room at Toledo's Mercy Hospital to the sacristy of the hospital chapel to commit a premeditated murder, involving 31 stab wounds, ligature strangulation, and an intentional sexual assault. According to the State's theory, this planned attack occurred between 6:50 a.m. and 7:30 a.m., on Easter

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[3] At trial, some State experts called this instrument a "dagger." Others referred to it as a "letter opener." It is in fact a saber-like souvenir, which is too dull and too thick to open letters.

Eve, when hospital employees were changing shifts and when worshippers were certain to be present in the chapel.

*The "Cold-Case" Is Not The Old Case*

2. The 1980 detectives and the Lucas County Coroner quickly ruled out premeditation and sexual assault as a motive for this crime, settling upon a theory supported by the evidence – this was an unpremeditated, impetuous, frenzied rage killing, committed by an angry insider with motive, who staged a sexual assault crime scene. *Id.* A-5 at ¶ 10, A-7 at ¶ 13.

The only contested issue in this wholly circumstantial case was the identity of the murderer. Critical to Father Robinson's theory of innocence was the evidence developed in 1980, much of which is lost. He, who is diminutive in stature, with very small hands, claimed that he could not have manually strangled the victim in the manner described by the deputy coroner who examined the victim's body at autopsy in 1980. Instead, he maintained the murderer was a person with great strength and very large hands. And he maintained that the only item taken from this crime scene and never found – a thin, sharp-edged, pair of sewing scissors – was in fact the murder weapon. He also maintained that the time of death was after 7:30 a.m., that he was in his room at Mercy Hospital until Sister Margaret Ann's superior summoned him to perform the Catholic sacrament of last rites at 8:20 a.m., and that he had absolutely no motive to kill the victim.

As in any murder case, the most crucial forensic evidence developed in 1980, were the factual

findings and opinions of the forensic pathologist who examined the body at autopsy within hours of the murder. Lucas County's most experienced pathologist, Dr. Renate Fazekas, concluded that the murderer manually strangled the victim from behind, and that the manual strangulation was in all likelihood performed "by an individual with large hands." *Id.* A-6 at ¶ 11.

Within days of the murder, the Nuns discovered that the scissors the victim was using to prepare the chapel for Easter Mass on the morning of the homicide were missing. In aid of the investigation, they provided the police with a pair of scissors very similar in sharpness and symmetry to the missing scissors. *Id.* A-11 at ¶ 20. Comparing the sample scissors to the stab wounds by puncturing the victim's flesh, Dr. Fazekas opined that the missing scissors "very well could have been the murder weapon." "But she would not say with 100% certainty." [4] *Id.* A-11, A-12 at ¶ 21.

Dr. Fazekas' external measurements of the stab wounds at autopsy pointed in the direction of a double-bladed very sharp instrument, unlike the single-bladed, dull letter opener. *Id.* More importantly, her internal measurements of the stab wounds described a death instrument that did not

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[4] By contrast, Dr. Fazekas' examination of the letter opener in late April of 1980 resulted only in a statement that it was "compatible" with the stab wounds. *Id.* A-12 at ¶ 22.

vary in width, unlike the letter opener, which does.[5] In addition, Dr. Fazekas opined that there was no sexual assault. Instead, she concluded the murderer staged a sexual assault crime scene to divert police attention. *Id.* A-7, at ¶ 13.

Margaret Warren, a receptionist at Mercy Hospital, punched in at 7:35 a.m., on April 5, 1980. She provided the police with critical evidence concerning the time of death. In 1980, Ms. Warren told the police that she heard "loud frantic footsteps" running away from this crime scene 15 minutes after she punched in at 7:50 a.m. *Id.* A-8, A-9 at fn. 4.

Father Jerome Swiatecki – the other priest in residence at Mercy Hospital – was the only person among 100 witnesses, interviewed by seven experienced homicide detectives in 1980, who pointed to Father Robinson as a possible suspect. Swiatecki was a huge man (250 - 260 lbs.) with great strength and large hands. *Id.* A-31 at ¶ 70. Thus, he had the means to strangle the victim in the manner described by Dr. Fazekas. He also fit the detectives' 1980 theory that this was a rage killing by an angry insider with motive. It was Father Swiatecki and not Father Robinson who shortened the April 4, 1980, Good Friday Services. *Id.* A-8 at fn. 3. This made the victim so angry that it reduced her to tears on Good Friday. *Id.* A-7, A-8 at ¶ 14. At this point, Sister Pahl

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[5] The "actual prejudice" analysis in the opinion below makes no mention of these critical, of record, identifying measurements, which support innocence.

told her housekeeper "she was going to speak with 'Father' about his proposed changes to the Easter Service." *Id.* A-37, A-38 at ¶ 83. Some 12 hours later, she was dead.

The 1980 detectives could not verify Swiatecki's whereabouts between 7:30 a.m. and 7:50 a.m. on April 5, 1980. Indeed, his alibi, during this critical timeframe, is still unknown. And because of his familiarity with the crime scene (a very small sacristy), it was he who conducted its inventory on the morning of the murder. But in a bloody murder case involving 31 stab wounds, he did not tell the police that the sewing scissors used by the Nuns to prepare the chapel for Mass were missing.

For his part, Father Robinson cooperated fully with the investigators' requests in April of 1980. Not one of the witnesses interviewed in 1980 said they had seen Father Robinson at any time prior to 8:25 a.m., when he arrived to administer the sacrament of the last rites. And not one could offer the detectives any reason why he would want to murder the victim.

In 1980, when all of the forensic and occurrence witnesses were alive, when all of the forensic, physical, and documentary evidence was available, and when memories were clear, the then-Lucas County Prosecutor evaluated the evidence, and concluded he had no case against Father Robinson. *Id.* A-13, at ¶ 24. And the only new evidence, previously unavailable in 1980, was DNA testing, all of which excluded Father Robinson as a suspect. *Id.* A-25, A-26, A-27 at ¶¶ 57-62.

3. Several critical witnesses with information supporting Father Robinson's innocence died during the 24-year delay. Most importantly, Dr. Fazekas had died. Thus, the defense could not compel her attendance at trial and present her live expert testimony. If the jury believed her contemporary observations about the stab wounds, the murder weapon, the manner of strangulation, and the absence of a sexual assault, Father Robinson would have been acquitted. Making matters worse, the State lost the sample scissors, which formed the basis of Dr. Fazekas' opinions. Therefore, the sample scissors were unavailable for the defense to examine pre-trial or use in cross-examining the State's experts. They also could not be presented to the jury to evaluate and compare with the letter opener or clay impressions of the letter opener, which the State introduced in support of its theory of guilt. *Id.* A-22 at ¶ 49. Adding to Father Robinson's dilemma, by 2004, the victim's skin had fully decomposed so that the stab wounds were incapable of external or internal forensic examination.[6] Thus, Dr. Fazekas was the only person with first-hand knowledge of the critical identifying dimensions of the stab wounds. And she

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[6] The State exhumed the body after indictment in 2004. But the State experts could only examine seven indentations in the victim's bone. Three were determined to be "consistent" with the letter opener.

was the only person who could explain her 1980 factual findings and opinions to the jury.

Ensuring prejudice at trial, the State impeached Dr. Fazekas' opinion that there was no sexual assault, her opinion that this was a staged crime scene, her opinion of manual strangulation, and her opinion that the missing scissors were likely the murder weapon. *Id.* A-35, A-36, A-15, A-16, A-21 at ¶¶ 79, 31, 47, respectively. Of course, since Dr. Fazekas was dead, and since the victim's body had fully decomposed by 2004, there was absolutely no way for the jury to evaluate the veracity of her 1980 findings or opinions. And there was no way for the defense to rebut the powerful live testimony the State presented to impeach Dr. Fazekas' credibility and findings.

Due to the passage of time, Margaret Warren was also dead. Therefore, the jury could not assess her credibility or the factual circumstances surrounding her 1980 first hand observation that she heard "loud frantic footsteps" running away from this crime scene at precisely 7:50 a.m. Ms. Warren's account was critical for two reasons. First, it meant that Father Swiatecki, who had no alibi after 7:30 a.m., who had upset the victim on the day before her death, and who had the means to manually strangle her in the manner described by Dr. Fazekas, also had the opportunity to commit this homicide. Second, Ms. Warren's contemporary account directly contradicted the time of death trial testimony of two State witnesses.

Father Swiatecki had also died by 2004, and the State lost or destroyed all of his 1980 statements. Compounding the trial prejudice, the memories of the 1980 detectives, whom had retired, had faded to the point that the State did not even call them as witnesses. *Id.* A-100 at ¶ 236. Swiatecki's death, the loss of his statements, combined with the faded memories of the 1980 detectives, deprived the jury any ability to assess his alibi, his lack of a factual basis for accusing Father Robinson, and his motive to kill. No one will ever know why he was the only person to point to Father Robinson. No one will ever know if he diverted attention from himself by not disclosing the missing sewing scissors. More importantly, no one will ever know what he did to upset Sister Pahl on Good Friday – just one day before her death.

Adding fuel to the fire, the State also lost or destroyed all of Father Robinson's 1980 statements. *Id.* A-2, A-3 at ¶ 4. The State capitalized on this loss by presenting testimony from the detectives who interviewed Father Robinson in 2004 and claimed that his 2004-videotaped statements were inconsistent with his 1980 oral statements. Due to the loss of these documents, and the faded memories of the 1980 detectives, Father Robinson had no opportunity to assess his right to testify. And he had no opportunity to challenge the 2004 detectives' testimony by means of cross-examination or even point out consistencies between the two sets of

statements. These inferences of guilt were un-rebuttable.

When viewed through the prism of the State's weak circumstantial evidence on the element of identity, the prejudice caused by delayed justice in this case was outcome determinative. Here, state-of-the-art DNA testing produced the profile of an unknown male contributor to this crime scene. *Id.* A-25, A-26, A-27, at ¶¶ 57-62. But all DNA testing excluded Father Robinson as that contributor. *Id.* Ohio BCI bloodstain pattern analysis on a bloody crime-scene altar cloth found no link between the bloody imprints on the altar cloth and Father Robinson's letter opener.[7] Ohio BCI DNA testing for blood on the letter opener, found no DNA and thus, no blood. *Id.* A-13 at ¶ 27.

Three world-renowned experts, hired by the State after indictment, could not identify the letter opener as the murder weapon to a reasonable degree of scientific certainty. In fact, the world's foremost forensic scientist, Dr. Henry Lee, when pressed to answer if the "letter opener" was the murder weapon, said, "all I can conclude is similar to. Could be.[8] There were no eyewitnesses to this crime. There was

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[7] In assessing the strength of the State's admissible evidence, the "actual prejudice" analysis in the opinion below makes no mention of this, of record, exculpatory forensic evidence.

[8] Dr. Lee's inconclusive of record opinion is also conspicuously absent from the "actual prejudice" analysis in the opinion below.

no confession. There was no believable evidence of motive.

*It Was Father – In The Sacristy – With The Letter Opener*

4. The cold-case detectives who resuscitated this investigation manufactured a case in 2004, when they had none in 1980. First, they hired experts and "re-interviewed" witnesses to impeach the 1980 evidence. The State relied upon the expert testimony of a forensic pathologist, the testimony of a 90-year-old witness, and the expert testimony of a doctoral student, who manufactured a contemporary Catholic occult theory of guilt. Then, the detectives obtained videotaped statements from Father Robinson after conducting a custodial "ask-first" interrogation in contravention of the strictures of *Miranda*, and used those videotaped statements to implicate him.[9]

The cornerstone of the State's case was the testimony of one of its own – Toledo Cold Case Squad Member, Dr. Diane Scala-Barnett. Based upon her examination of one of the seven defects in the victim's

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[9] The trial court denied a pre-trial motion to suppress, finding that Father Robinson was not in "custody" during the "ask-first" session under *Miranda v. Arizona*, 384 U.S. 436 (1966), *Id.* B-7 – B-14, and the appellate court affirmed. The *Miranda* determination is in issue, because a reviewing court must weigh the prejudice suffered against only the Government's admissible evidence when assessing "actual prejudice" under *Lovasco*. *See State v. Luck*, 472 N.E.2d 1102 (1984) (applying *Lovasco*).

decomposed bone, she said the "letter opener," or "an instrument exactly like it," was the murder weapon. *Id.* A-21 at ¶ 47. Since Father Robinson was in exclusive control of the letter opener, this opinion meant that he was the only person who could have committed this crime. And contrary to Dr. Fazekas' 1980 manual strangulation opinion and her contemporary findings in support of that opinion, Barnett said "soft ligature strangulation," was involved. *Id.* A-15, A-16 at ¶ 31. This opinion meant that a very small person, with small hands, like Father Robinson, had the means to strangle the victim.

Sister Madelyn Gordon testified for the State to impeach Margaret Warren's 1980 account of hearing the "loud frantic footsteps" at 7:50 a.m. Sister Gordon recalled that she entered the chapel at approximately 7:30 a.m., and that she remained there until she discovered the body in the sacristy at 8:20 a.m. *Id.* A-28, A-29 at ¶ 65. This supported the State's theory of the time of death (before 7:30 a.m.).

Suitably rounding off their contemporary theory in a fashion reminiscent of the infamous Salem Witch Trials of the 17th Century, the prosecutors relied upon the occult to prove guilt. Father Jeffrey Grob, a self-proclaimed exorcist, told the jury that "tarot cards and horoscopes" were part of his expertise, which, in his words, involved counseling people "who believe they are possessed" by the devil. *Id.* A-81 at ¶ 184. Even though there was no evidence that Father Robinson believed in the

occult or that he ever acted upon such a belief in the past, Grob opined to a reasonable degree of "religious certainty" that, because of what he viewed as the crime scene's occult characteristics, the killer had "specialized knowledge of the rituals of the Catholic Faith." *Id.* A-35, A-36 at ¶ 79. "Certainly a priest would have that kind of knowledge," he said. *Id.* According to Grob, the time, place, and location implicated the occult. He said a blood smear on the victim's forehead was a "satanic mockery" of the sacrament of last rites. He called the killer's evil hand motivation "mockery reversal" intended to mock the "bride of Christ," the "Catholic Church," and "God." *Id.* A-78, A-79 at ¶ 179, A-81 at ¶¶ 183-86.[10] And based upon Dr. Fazekas' finding of a "minor scratch just inside" the victim's "vagina," which she concluded, "could have been caused by a fingernail or rough instrument," Grob opined that the killer sexually assaulted Sister Pahl. *Id.* A-35, A-36 at ¶ 79.

Father Grob's sensational testimony amounted to nothing more than a vehicle for the prosecutors to demonize Father Robinson in summation, and link him and the Catholic Faith to the occult. There, they suggested that Father Robinson used his letter

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[10] The trial court admitted Father Grob's inherently unreliable occult profile over objection. And the appellate court found its admission constitutionally permissible, reasoning that it was like the science of "accident reconstruction." *Id.* A-80 at ¶ 181. For the reasons mentioned above, *see* fn. 9, these determinations are also in issue.

opener to anoint the victim in her own blood in a "bastardized" version of the last rites and to "penetrate" her with its blade. And they remarked: "if the victim were Jewish, he would have carved a Swatiska on her chest." *Id.* A-39 at ¶ 87. Accordingly, the prosecutors exhorted the jury to convict to provide "justice for the 'bride of Christ.'" *Id.* A-46 at ¶ 105.

*The Hobson's Choice*

5. The death of Dr. Fazekas, the loss of the sample scissors she examined, the decomposition of the victim's body, the death of Margaret Warren, the death of Father Swiatecki, the loss or destruction of Swiatecki's 1980 statements, the loss or destruction of Father Robinson's 1980 statements, and the loss of the memories of the 1980 detectives, presented Father Robinson's lawyers with a Hobson's choice at trial. Certainly, they could try to defend without the missing evidence. But this choice meant they could not counter any of the key components of the State's case: the letter opener as the murder weapon and not the missing scissors, soft ligature strangulation and not manual strangulation by an individual with large hands, a time of death before 7:30 a.m. and not after, and an intentional sexual assault motivated by the occult and not a staged crime scene. On the other hand, they could defend by attempting to introduce some of the missing evidence in the form of testimonial hearsay contained in 1980 police reports. But this choice opened the door to the introduction of inculpatory testimonial hearsay, in contravention of

the right of confrontation. And it certainly ensured a finding of the waiver of Father Robinson's right to confrontation on appeal. *Id.* A-4 at fn. 1. Concluding that a partial hearsay defense was preferable to no defense at all, Father Robinson's lawyers opted for the latter, by convincing the trial judge to admit 1980 documents under the ancient documents exception to the hearsay rule. *Id.*

But due to the passage of time, the only hearsay documents available in 2006, were Dr. Fazekas' very brief unexplained opinions recited in three police reports, a rough sketch of the sample scissors, Ms. Warren's two-sentence statement, and Dr. Fazekas' seven page autopsy report. Thus, the jury received Dr. Fazekas' findings and opinions, her critical mathematical measurements of the stab wounds, the sample scissors she examined in 1980, and Margaret Warren's first-hand 1980 observations in the form of 12 pieces of paper. By contrast, the testimony of Dr. Barnett, Father Grob, Sister Gordon, and the cold-case detectives consumed more than a week of trial.

The jury took less than a business day to return a guilty verdict. Father Robinson was immediately sentenced to 15 years to life imprisonment. *Id.* C-1, C-2.

*No Harm – No Foul*

6. On direct appeal, Father Robinson maintained that he suffered actual prejudice to his ability to defend himself, due to the 24 years of

pre-prosecution delay.[11] The Ohio appellate court held that lost or destroyed evidence that impeaches the Government's case on an essential element of the crime charged cannot establish "actual prejudice," under *Lovasco*. *Id.* A-71 at ¶ 161. In order for a due process claim to ripen under *Lovasco*, the lower court required that evidence lost or destroyed due to the unexplained passage of time, must "prove[] the defendant's asserted defense." *Id.* A-51 at ¶ 121. This standard goes further than any state or federal court requires.

Additionally, the court found that – no matter the prejudice suffered – the loss of only one witness cannot meet the "actual prejudice" standard of *Lovasco*. *Id.* A-54, A-55 at ¶ 128. The opinion below also inserts the following substantive terms into the constitutional standard not used by this Court in *Lovasco*: "prejudice will not be found due to the lack of non-exculpatory evidence," and the moving party must produce "concrete" proof of "substantial" prejudice. *Id.* A-50, A-51 at ¶ 121.

The Ohio appellate court found no "actual prejudice" under this standard, reasoning "the

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[11] Father Robinson's lawyers asked the trial court to dismiss the indictment on due process grounds, because of the loss of evidence. *Id.* at B-4. After conducting an evidentiary hearing, the court denied the motion, citing *State v. Bruce*, No. 02CA40, 2003 WL 1756433 (Ohio Ct. App. Apr. 3, 2003) (interpreting *Lovasco*, and finding no actual prejudice). *Id.* at B-5.

missing evidence here went to the credibility of the State's evidence," a matter that was, in the court's counter-intuitive view, "best left for trial." *Id.* A-71 at ¶ 161.

**Reasons for Granting the Petition**

This case is cert-worthy for three reasons. First, the threshold due process question of when a pre-prosecution delay claim is ripe for adjudication has not been, but should be, settled by this Court. Second, the opinion below conflicts with this Court's settled Fifth and Sixth Amendment precedent. Third, this case is of public and great general interest.

**I. The threshold due process question of when a pre-prosecution delay claim is ripe for adjudication has not been, but should be, settled by this Court.**

Recognizing that delayed justice may in fact deny justice, the *Lovasco* Court articulated a two-part test to define the role of the Due Process Clause in cases of pre-prosecution delay. Under the first prong, a due process claim is concrete and ripe for adjudication when the accused demonstrates "actual prejudice" to his or her defense. Upon this demonstration, a court adjudicates the claim, under the second prong, by examining the Government's

justification for the delay to determine if the Due Process Clause is violated.[12]

But the majority opinion in *Lovasco* did not define the terms "actual prejudice," address the type of evidence and quantum of proof necessary to meet that threshold, and did not address the merits of the circuit court of appeals' finding of "actual prejudice" there.[13] And the *Lovasco* Court did not discuss the circumstances under which a pre-prosecution delay violates the Due Process Clause, did not decide who has the burden of proof under the second prong, and did not address the interplay between the two prongs of the test.

Thus, the *Lovasco* Court left the task of defining the critical triggering event under the first prong – "actual prejudice" – and the task of weighing the ultimate due process question under the second prong – "the justification for the delay" – to the lower

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[12] As stated above, the lower court, in error, found no "actual prejudice" under the first prong of *Lovasco*. Thus, if this Court reverses, it may examine the legitimacy of this prosecution, under the second prong of the test – a question that has also deeply divided the lower courts. *See* § I. A., below.

[13] In *Lovasco*, the lower federal courts found "actual prejudice" due to the loss of the potentially exculpatory testimony of 2 witnesses. *United States v. Lovasco*, 532 F.2d 59 (8th Cir. 1976), *rev'd*, 431 U.S. 783 (1977). And in dissent in *Lovasco*, Mr. Justice Stevens would have affirmed that finding. 431 U.S. at 797 (Stevens, J., dissenting).

courts. As the predictable consequence of a lack of guidance from this Court, the lower courts are now in significant disagreement on the meaning of both prongs of the *Lovasco* test. Indeed, the practical effect of 32 years of judicial uncertainty means, as Mr. Justice White observed some 21 years ago, that liberty, in pre-prosecution delay cases, depends upon the happenstance of venue.[14]

A. Application of the *Lovasco* test is not uniform.

Application of *Lovasco* in the federal courts has produced results that are not uniform in factually analogous cases for one straightforward reason. The majority of the circuit courts, in error, interpret *Lovasco* to mean that no matter the amount of harm caused by delayed justice, the Due Process Clause is never violated in the absence of proof of an improper prosecutorial motive, designed to gain a tactical advantage or advance some other improper purpose.[15]

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[14] *See United States v. Hoo*, 484 U.S. 1035 (1988) (White, J., dissenting from denial of certiorari); *see also Howell v. Barker*, 498 U.S. 1016 (1990) (noting Justices White and Kennedy's votes to grant certiorari).

[15] *See, e.g., United States v. Ingram*, 446 F.3d 1332, 1336-1339 (11th Cir. 2006); *United States v. Haskell*, 468 F.3d 1064, 1070 (8th Cir. 2006); *United States v. Avants*, 367 F.3d 433, 441-442 (5th Cir. 2004); *United States v. Beckett*, 208 F.3d 140, 150-151 (3rd Cir. 2000); *United States v. Kendrick*, 221 F.3d 19, 33 (1st Cir. 2000).

Thus, in these jurisdictions there is no need to assess prejudice, absent record proof of prosecutorial misconduct. Consequently, some of these courts routinely skip the prejudice analysis altogether and deny motions to dismiss in the absence of proof of misconduct. This explains why, even after 32 years of litigation, there is a dearth of analysis on the actual prejudice prong of the test.

The minority, and better-reasoned view, relies upon the recognition that Due Process Clause interpretation requires a delicate balanced prejudice analysis. Under this view, intentional prosecutorial misconduct is not required for finding a due process violation. Instead, this approach holds that the proper inquiry is to balance the prejudice suffered by the accused, under the first prong, against the Government's justification for the delay, under the second prong.[16] And while the majority of the federal courts require a defendant to prove the Government's improper motive, the Fourth and Seventh Circuit Courts of Appeal, and a significant number of the state supreme courts, disagree. Upon a showing of "actual prejudice," these courts shift the burden to

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[16] *See, e.g., United States v. Sowa*, 34 F.3d 447 (7th Cir. 1994); *Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990); *State v. Knickerbocker*, 880 A.2d 419 (N.H. 2005); *State v. Whiting*, 702 N.E. 1199 (Ohio 1998); *State v. Brazell*, 480 S.E.2d 64 (S.C. 1997); *Gonzales v. New Mexico*, 805 P.2d 630 (N.M. 1991); *State v. Cyr*, 588 A.2d 753 (1991); *State v. Dixon*, 792 P.2d 137 (Wash. 1990).

the Government to prove that its reasons for the delay outweigh the prejudice suffered by the accused.[17] But a review of the federal and state cases, where the first prong of *Lovasco* is routinely addressed on its merits, evinces a deep divide on the very meaning of the terms "actual prejudice."

B. The meaning of the first prong of the *Lovasco* test is not settled.

On one end of the constitutional spectrum, the outer limits of the "actual prejudice" standard are clear. State and federal courts agree on the uncontroversial proposition that the first prong of *Lovasco* is not satisfied by vague and generalized assertions that lost witnesses, lost documents or faded memories impaired a defense.[18] Rather, courts uniformly require a defendant to specifically articulate how the lost evidence or witness would assist the defense; a defendant's mere speculation as to the content of the lost witness testimony or evidence, will not suffice. Otherwise, virtually any delay would raise due process concerns, because a defendant can always make an argument that he or

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[17] *See* fn. 16 above.

[18] *See, e.g.*, *United States v. Mmahat*, 106 F.3d 89, 94-95 (1st Cir. 1997); *United States v. Johnson*, 120 F.3d 1107, 1110 (10th Cir. 1997); *State v. Crail*, 35 P.3d 197, 205 (Haw. 2001); *State v. Rippy*, 626 A.2d 334, 339 (Me. 1993); *Phillips v. State*, 835 P.2d 1062 (Wyo. 1992).

she could have used potential evidence or witnesses that are unavailable.

But across the rest of the spectrum, the federal and state courts are far from uniform in articulating how a defendant actually establishes prejudice sufficient to meet the first prong of *Lovasco*. The distinct trend in federal jurisdictions places questionable limitations on the conditions under which prejudice will be found.[19] For example, many courts, like the court below, inject additional terms in their description of the prejudice analysis, which in practical terms then impose additional quantum of proof requirements not contemplated by *Lovasco*. Some courts require a showing of "substantial and actual prejudice" without explaining how to meet this seemingly higher standard.[20] In this case, a showing of "substantial prejudice" and "concrete proof" was required. But this Court described the first prong of

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[19] *See, e.g.*, *United States v. Martinez*, 77 F.3d 332, 335 (9th Cir. 1996) ("The task of establishing the requisite prejudice . . . is so heavy that we [previously] have found only two cases since 1975 in which any circuit has upheld a due process claim") (quoting and citing *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992)).

[20] *See, e.g.*, *United States v. Jackson*, 446 F.3d 847, 849 (8th Cir. 2006) (actual and substantial); *United States v. Crouch*, 84 F.3d 497 (5th Cir. 1996) (en banc) (same); *State v. Lemming*, 937 P.2d 381 (Ariz. App. Div. 1997) (same); *State v. Alexander*, 708 A.2d 770 (N.J. Super. Ct. App. Div. 1998). (same); *Phillips v. State*, 835 P.2d 1062 (Wyo. 1992) (substantial prejudice).

the due process analysis as simply requiring proof of "actual prejudice" – in literal terms, "real harm."

These additional adjectives are not just hyperbole. They have real practical impact on how a defendant establishes prejudice under *Lovasco*. For sure, it is one thing to require a defendant to articulate what the lost testimony would have been and to explain how the missing evidence would have helped his or her defense, relying on information and evidence available in the record, where possible.[21] *Lovasco* contemplated this degree of proof and level of specificity, because it prevents defendants from

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[21] *See, e.g.*, *Manning v. Bowersox*, 310 F.3d 571, 578 (8th Cir. 2002) (death of 3 witnesses during 6½ year delay, constituted actual prejudice as defendant would have been better prepared had these witnesses been available for questioning); *United States v. Barket*, 530 F.2d 189 (8th Cir. 1976) (affirming dismissal for pre-indictment delay where defendant articulated how dead witnesses would have aided his defense); *United States v. Alderman*, 423 F. Supp. 847 (D. Md. 1976) (finding actual prejudice where defendant produced affidavit of three witnesses who could not remember critical events because of lengthy delay); *State v. Lee*, 602 S.E.2d 113 (S.C. Ct. App. 2004) (destruction of records during 12 year delay constituted actual prejudice, because it impaired the right to effective cross-examination), *Gonzales v. New Mexico*, 805 P.2d 630 (N.M. 1991) (the actual prejudice showing need not rise to the level of severe prejudice, but must establish that the prejudice impacted the defense); *State v. Luck*, 472 N.E.2d 1097 (1984) (finding actual prejudice from loss of alibi witness who could have corroborated defendant's self-defense theory and minimized impact of state's case).

making bald assertions of prejudice without any explanation of the exculpatory value of the lost evidence, and because it assists a reviewing court in making the prejudice assessment. But it is quite another to require, as many courts do, a greater quantum of proof and greater specificity than that.

Indeed, several examples of heightened proof requirements emerge from a survey of the federal and state cases addressing actual prejudice claims. For example, some courts, without explanation, render the standard nearly insurmountable by requiring "definite" actual prejudice.[22] Others question whether exculpatory "lost testimony can ever constitute actual prejudice."[23] Many courts dismiss due process claims based on missing documentary and physical evidence out of hand, reasoning that the defendants' claims were speculative because they could not prove that the lost evidence would have actually helped their defense. This is so, even in cases where the destruction of the evidence itself made it impossible for the defendant to prove any such thing.[24] Other courts recognize the inherent unfairness of this type

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[22] *United States v. Rogers*, 118 F.3d 466, 477 n.10 (6th Cir. 1997).

[23] *United States v. Ross*, 123 F.3d 1181, 1185 (9th Cir. 1997).

[24] *United States v. DeGeorge*, 380 F.3d 1203, 1212 (9th Cir. 2004) (defendant could not prove prejudice due to destruction of a vessel).

of circular reasoning.[25] And some appellate courts require trial courts to defer rulings on *Lovasco* motions until after trial, reasoning that any pre-trial motion to dismiss, in a *Lovasco* case, is per-se speculative.[26]

In lost witness cases, some courts require defendants to produce some form of independent written verification of what the lost testimony would have been (in the form of a deposition or other sworn statement), stating that such corroboration is required to ensure the defendant's allegations are not speculative.[27] Thus, without the precipitous event of having obtained a sworn prior statement as to what a dead witness would say, at a time (sometimes

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[25] *Barnett v. State*, 867 N.E.2d 184 (Ind. Ct. App. 2007); *State v. Brown*, No. 98CA25, 2000 WL 303142 (Ohio Ct. App. Mar. 17, 2000).

[26] *United States v. Crouch*, 84 F.3d 1497, 1523 (4th Cir. 1996); *State v. Knickerbocker*, 880 A.2d 419 (N.H. 2005).

[27] *See, e.g.*, *United States v. Davis*, 598 F. Supp. 453 (S.D.N.Y. 1984) (no prejudice found because of lack of corroboration of witness' testimony, such as a deposition); *Shiro v. State*, 888 N.E.2d 828 (Ind. Ct. App. 2008) (no prejudice found where there was no affidavit or deposition supporting defendant's assertion). *But see United States v. Sample*, 565 F. Supp. 1166, 1177 n.17 (E.D. Va. 1983) (finding prejudice where dead witness was critical to defendant's theory of innocence, even though his deposition testimony was available to the *defendant*, and recognizing that "how a witness testifies is at least equally important as what he says").

decades before) when there is no reason to obtain such a statement, defendants in such jurisdictions are out of luck. Other courts have gone even further, requiring a defendant to not only prove the contents of the lost testimony and its materiality, but also to convince the court that the dead witness was credible, that he or she would have testified at trial, withstood vigorous cross-examination, and been believed by the jury.[28]

Finally, a few courts, such as the appellate court below, eschew claims of prejudice stemming from the loss of critical defense witnesses where portions of the missing witnesses' testimony are available in some form of hearsay, without any consideration of the probative value that live testimony has upon a jury under the circumstances. But other courts recognize that this result stretches the concept of duplicative evidence to an illogical extreme where the physical presence of live witnesses at trial is as critical to innocence as the content of the documents themselves.[29]

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[28] *E.g.*, *United States v. Spears*, 159 F.3d 1081, 1085 (7th Cir. 1998); *United States v. Rogers*, 118 F.3d at 475; *State v. Dunlap*, 930 P.2d 518 (Ariz. App. Div. 1996).

[29] *Sample*, 565 F. Supp. at 1177 n.17; *People v. Boysen*, 62 Cal. Reptr.3d 350, 362 (Cal. App. 4th Dist. 2007) (court found actual prejudice from death of defense alibi witness; although her statement was admissible at trial, defendant had no opportunity to rehabilitate her testimony).

The results in these cases demonstrate the need for this Court's clarification of the parameters of the first prong of the *Lovasco* test. Requiring more than a clear explanation, grounded in evidence, as to how lost testimony, physical evidence or documents are exculpatory and would assist a defense, places an impossible burden on the proponent. It is precisely because the evidence or testimony is unavailable, unevaluated, and unobtainable elsewhere that its proponent cannot conduct an investigation and show additional proof of content, materiality, strength, and believability. In any event, such restrictions upon due process rights go far beyond that required to foster the policies underlying the *Lovasco* "actual prejudice" rule.

C. This case provides the opportunity to establish a meaningful and predictable guideline for the lower courts to follow.

The law of this case elevates the first prong of the *Lovasco* test to a new untenable, virtually insurmountable legal standard, where a due process pre-prosecution delay claim never ripens when lost evidence impeaches a circumstantial case on the only issue at trial – in this case, the identity of the murderer. The lower court's conclusion that evidence that impeaches the credibility of a weak circumstantial case cannot establish "actual prejudice," because it does not "prove a defense" misses the point of *Lovasco* and defies reason and common sense. Put simply, missing evidence, which assists in effectively cross-examining a Government

witness or otherwise diminishes the credibility of a weak circumstantial case, by definition, must meet the "actual prejudice" standard. If not, then contrary to *Lovasco*, the Due Process Clause plays no role in protecting against oppressive pre-prosecution delay. The law of this case is so wrong that it provides a clear basis to clarify the first prong of the *Lovasco* test.

This case also presents the rare opportunity to clarify the "actual prejudice" standard in the context of a factual record unlike that of *Lovasco* and unlike that of the overwhelming majority of pre-prosecution delay cases.[30] Here, the missing evidence is exculpatory, rather then potentially exculpatory, the harm suffered is real and not speculative, prejudice is discernable from a trial record and not a pre-trial record, and the admissible circumstantial evidence of guilt is weak.

There can be little dispute that the lost evidence in this case was material to innocence and probative of third-party guilt. Dr. Fazekas' expert testimony, the sample scissors, the stab wounds she examined in 1980, and Ms. Warren's 1980 observations alone contradict the State's entire case on the key element of identity, by powerfully pointing to a different murder weapon, a different means of strangulation, a different time of death, and the

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[30] *E.g. United States v. Barken*, 412 F.3d 1131, 1134 (9th Cir. 2005) (noting that burden of proving prejudice is "rarely met").

absence of any sexual component to this crime. And since the State impeached all of this lost evidence, the prejudice suffered due to its absence at trial is palpable.

Furthermore, because the State's trial evidence tended to exclude Father Swiatecki, who had upset the victim on the day before her death, and who had the means to kill in the manner described by Dr. Fazekas, his death, the loss of his 1980 statements and the loss of the memories of the 1980 detectives meant that he had an un-rebuttable alibi. Moreover, the loss of Father Robinson's 1980 statements, coupled with the dimmed memories of the detectives, presented a significant impediment to his right to testify on his own behalf, and an inability to confront damaging testimony probative of his credibility, which the State placed directly in issue. The lost evidence here would have done much more than just significantly minimize the State's case. Indeed, Dr. Fazekas' live testimony alone would have raised a doubt, based upon reason and common sense, in the mind of any rational juror.

But the lost evidence of this case did not bother the Ohio appellate court. It found "no prejudice," because of the admission of Dr. Fazekas' opinions and findings in the form of hearsay, because of the admission of Ms. Warren's account in the form of another "testimonial" piece of paper, and because of the introduction of a rough 1980 sketch of the sample scissors. But these innocuous pieces of paper do nothing to advance Dr. Fazekas' or Ms. Warren's

credibility; they cannot explain the factual bases of critical expert opinions, post-mortem findings and critical measurements of stab wounds, and they cannot substitute for first-hand contemporary observations. Nor can they rebut the discrediting impeachment testimony the State put before the jury in this case. Only a live witness can. This hearsay – 26 years after the fact – was neither meaningful nor complete, in a constitutional sense.

Father Robinson's due process claim was ripe for adjudication under *Lovasco*. He demonstrated real harm to his ability to defend himself. Thus, the lower court should have adjudicated the due process claim under the second prong of the *Lovasco* test. This Court has that opportunity, in the context of a record where there is no legitimate reason for the near quarter of a century of delay between this crime and this indictment.

## II. The opinion below conflicts with this Court's settled Fifth and Sixth Amendment precedent.

The right to a meaningful opportunity to present a complete defense has long been recognized by this Court's jurisprudence. As the Court stated in *California v. Trombetta*,[31] "whether rooted directly in the Due Process Clause, or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution provides a criminal

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[31] 467 U.S. 479 (1984).

defendant with a meaningful opportunity to present a complete defense." Most recently, this Court explained in *Holmes v. South Carolina*,[32] that this important right is abridged where rules of law are arbitrary and go beyond the purposes they are designed to serve. In *Holmes*, this Court condemned the South Carolina Supreme Court's interpretation of an evidentiary rule barring the defendant from introducing evidence of third-party guilt. There, the Court found that the lower court's interpretation "radically changed and extended the rule," in a way that was inconsistent with the defendant's right to present a complete defense. In *Holmes*, the lower court's ruling limited the defendant's use of evidence that would have impeached the state's evidence of guilt on the element of identity, if believed by the jury.

This Court's constitutional analysis relied upon in *Holmes* applies here, where the standard articulated for proving actual prejudice is "arbitrary" and does not serve the end that *Lovasco's* actual prejudice standard was designed to promote – that of preventing vague and speculative assertions of prejudice. By applying a standard requiring that lost or destroyed evidence must "prove a defense" in order to establish actual prejudice under *Lovasco*, the Ohio appellate court's ruling, in the *Holmes* Court's words, "radically changes and extends" the *Lovasco* rule.

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[32] 547 U.S. 319 (2006).

This heightened standard has the practical affect of nullifying valid due process challenges and forcing defendants to stand trial without access to evidence that would enable them to present a complete factual defense.

The constitutional principle relied upon in *Holmes* is also implicated by the lower court's application of *Lovasco* to the lost evidence in this case. As this Court recognized in *Holmes*, a defendant's use of evidence that tends to undermine the reliability of the state's evidence, such as the lost evidence in this case, is an indispensable part of a criminal trial. Yet the lower court's ruling – that the volume of impeachment evidence lost in this case worked no actual prejudice on Father Robinson's ability to defend himself – states just the opposite. The lower court's treatment of impeachment evidence as incapable of establishing actual prejudice under *Lovasco* means that the right to place the Government's case "under the crucible of meaningful adversarial testing,"[33] is no right at all. Indeed, if the Confrontation Clause commands anything it is "not only that evidence is reliable, but rather that reliability be assessed in a particular manner, by testing in the crucible of cross-examination."[34] Furthermore, the jury must serve as the "lie detector"

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[33] *United States v. Cronic*, 466 U.S. 648 (1984).

[34] *Crawford v. Washington*, 541 U.S. 36 (2004).

assessing the relevant, competent evidence."[35] The approach below gives no recognition to these principles, the presumption of innocence, or the right to compulsory process. It is the very fact that the jury in this case had no ability to assess the dead witnesses' veracity or the live witnesses' credibility that rendered Father Robinson's defense neither meaningful nor complete.

## III. This case is of public and great general interest.

This case raises an issue of far-reaching national importance. One need only watch television and read the daily newspapers to conclude that the increasing frequency of the formation of "cold-case divisions" nationwide, and the application of modern scientific principles and techniques to investigate crimes that occurred in decades past, give widespread public impact and contemporary significance to the question presented.

Literally, every state in the union and every large metropolitan police force now have "cold-case units." Recognizing the legitimate need of law enforcement to pursue unresolved criminal investigations, the Justice Department has long authorized the expenditure of millions of dollars of taxpayer funds in the form of grants to the states for this purpose. Similarly, the President recently signed

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[35] *United States v. Scheffer*, 523 U.S. 303, 313 (1998).

into law authorization for the Justice Department and the FBI to reopen, investigate, and prosecute Civil Rights Era crimes occurring before January 1, 1970.[36]

Therefore, one thing is certain. The question of when pre-prosecution delay claims are ripe for adjudication, under *Lovasco*, will be the subject of recurring litigation in the state and federal courts for many years to come. The lower courts, law enforcement, and all citizens affected deserve an answer to the question presented in this case.

## Conclusion

Mr. Justice Brandeis put it this way: "experience should teach us to be most on guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[37]

What smacks of a violation of every sense of fair play and decency in this due process case is the extraordinary, unexplained pre-prosecution delay involved, the resulting loss of exculpatory evidence, the unrelated Catholic Clergy child sexual abuse

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[36] Pub. L. No. 110-344, 28 U.S.C. § 509 (2008) (Emmett Till Unresolved Civil Rights Crime Act of 2007).

[37] *Olmstead v. United States*, 277 U.S. 438, 479 (1925) (Brandeis, J., dissenting).

motivation for re-opening this 1980 case, and the indisputable fact that this is not a situation where previously unavailable evidence or new technology "cracked" a "cold" criminal case. Instead, it is one where the state of Ohio decided to hire expert witnesses, after indictment in 2004, to put a new spin on circumstantial evidence, all of which was available to it in 1980 or at any time thereafter.

If this Court does not intervene, no court will ever have the power to evaluate the legitimacy of this prosecution, and determine if, under the circumstances, the state of Ohio violated the Due Process Clause. For that reason and the reasons discussed above, this Court should review this important case on its merits.

Respectfully submitted,


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March 19, 2009

(2)

No. Supreme Court, U.S. FILED

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OFFICE OF THE CLERK

In the

# Supreme Court of the United States

Gerald Robinson,

Petitioner,

v.

State of Ohio,

Respondent.

**On Petition for a Writ of Certiorari to the Ohio Court of Appeals for the Sixth Appellate District**

## Petition Appendix


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**IN THE COURT OF APPEALS OF OHIO**
**SIXTH APPELLATE DISTRICT**
**LUCAS COUNTY**

State of Ohio
*Appellee*

v.

Gerald Robinson
*Appellant*

FILED
July 11, 2008

Lucas County Sixth
Appellate District
Court

Court of Appeals No. L-06-1182
Trial Court No. CR-0200401915-000

**DECISION AND JUDGMENT ENTRY**

Decided: July 11, 2008

* * * * *

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Lawrence J. Kiroff, Assistant
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Richard M. Kerger and
John P. Donahue, for appellant.

* * * * *

SKOW, J.

{¶ 1} Appellant, Gerald Robinson, appeals his conviction for murder entered by the Lucas County Court of Common Pleas in the above-captioned case. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On May 3, 2004, appellant was indicted on a single charge of aggravated murder, in violation of R.C. 2903.01(A). The crime with which appellant was charged occurred on April 5, 1980, just over 24 years prior to the issuance of the indictment.

{¶ 3} At arraignment, on May 7, 2004, appellant entered a plea of not guilty. Thereafter, he filed a motion to compel production of any audiotapes and any supplemental notes, police reports, or summaries involving police interviews with appellant that had taken place on or about April 18 and 19, 1980. In addition, he filed a motion to suppress statements that he made to Toledo police during an interview at appellant's home on April 23, 2004, and to suppress any evidence that may have been obtained from those statements.

{¶ 4} On February 3, 2006, the trial court heard evidence on both of these motions. In a judgment entry dated March 20, 2006, both motions were denied. Among the trial court's findings in support of its denial of appellant's motion to compel

were: (1) that appellant's interviews with the police on April 18 and 19, 1980, were never taperecorded, and, as a result, audiotapes of those interviews could not be produced; (2) that written notes of the interviews that were taken by Detective Arthur Marx could not be located by the prosecution and, for this reason, could not be produced; (3) that while the written notes from the 1980 interviews could potentially be useful to appellant, appellant failed to establish that the Toledo Police Department exercised bad faith in its failure to preserve those written notes.

{¶ 5} Rejecting an additional argument by appellant that the absence of interview notes, together with the absence of notes of referral to a polygrapher, constituted a violation of appellant's due process rights, the trial court found that appellant had failed to establish that any of the notes could be deemed to contain materially exculpatory evidence.

{¶ 6} The trial court based its denial of the motion to suppress on a finding that, contrary to appellant's contention, appellant had not been subject to a custodial interrogation during the April 2004 interview that was conducted in his home.

{¶ 7} Prior to trial, the state of Ohio amended the indictment to charge the lesser included offense of murder.

{¶ 8} Trial in the matter took place before a jury, beginning on April 17, 2006 and ending May 11, 2006. At trial, evidence of the following was adduced.[1] At approximately 8:20 a.m. on April 5, 1980, the body of 71 year-old Sister Margaret Ann Pahl, a Catholic nun, was found in the sacristy of the chapel in Toledo, Ohio's Mercy Hospital. She was lying flat on her back, with her arms to her sides, her

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[1]Early in the trial proceedings, defense counsel -- over vigorous objection by the state -- persuaded the trial court to admit into evidence as "ancient documents" police reports from 1980 that contained statements from third-party interviewees. Although appellant now claims that the admission of such evidence was in violation of appellant's confrontation rights under *Crawford v. Washington* (2004), 541 U.S. 36 and *Davis v. Washington* (2006), 547 U.S. 813, we find that any such rights were knowingly, intelligently, and voluntarily waived by appellant at trial. See *State v. Smith*, 3d Dist. No. 1-05-39, 2006-Ohio-1661; *State v. Urbina*, 3d Dist. No. 4-06-21, 2008-Ohio-1013. Appellant's decision to waive these rights was clearly in the nature of a trial strategy decision and, therefore, it will not be second-guessed by this court. See *State v. Mason*, 82 Ohio St.3d 144, 157.

legs together and straight, her habit pulled neatly up to her breasts, and her underwear pulled down around her right ankle. Her assailant had strangled her to the verge of death and then stabbed her 31 times. Initially, she was stabbed nine times through an altar cloth that her assailant had placed over her body. The altar cloth was then removed and Sister Paul was stabbed 22 more times to her face, neck and chest.

{¶ 9} Within minutes after the gruesome discovery was made, Toledo Police detectives arrived at the hospital and began their investigation. By the end of that first day of investigation, detectives had concluded that Sister Pahl had not interrupted a robbery. Assistant Chaplain Father Jerome Swiatecki had done a complete inventory of the sacristy in the chapel and reported that nothing of value was missing. In addition, Sister Pahl's purse was recovered from inside one of the cabinets in the sacristy. The only items not accounted for were a pair of sewing scissors that were normally kept in the sacristy and Sister Pahl's wrist watch.

{¶ 10} Investigators further believed that the murderer was someone who was angry at Sister Pahl and most likely knew her. According to testimony by Detective Art Marx, the fact that there were 31 stab

wounds indicated that the assailant was very angry. Marx further testified that such an elevated level of anger was inconsistent with the assailant having been a complete stranger to the victim.

{¶ 11} At some point on the day of the murder, before an autopsy had been conducted, Assistant Lucas County Coroner Dr. Renate Fazekas[2] told Det. Marx that it appeared that the victim had been "strangled from behind by an individual with large hands." This opinion, according to Det. Marx's report, was based on the fact that "a rather large bruise was noticed on the back neck." However, also noted in the detective's report was a statement by Dr. Fazekas that "the cause of death could not be determined until after a complete autopsy. "

{¶ 12} The next day, Sunday, April 6, 1980, investigators received additional information from

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[2]Dr. Fazekas was deceased at the time of trial. Any statements of hers that were admitted at trial came either from her own reports or from police reports of conversations with her. We note that autopsy reports and related test findings are not testimonial and do not violate the confrontation clause. *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, ¶ 88. And, as indicated in footnote 1, *supra*, the police reports from 1980 were admitted as ancient documents.

the coroner's office that the weapon used to inflict the stab wounds had a blade that was no more than, but was possibly less than, 1/2-inch in width and was at least 3 inches in length.

{¶ 13} By Monday, April 7, 1980, investigators believed that, despite Sister Pahl having been found in a state of substantial nudity, this crime was not motivated as a sexual assault. The physical evidence simply did not indicate that Sister Pahl had been raped. Her hymen was intact, and there was no evidence of semen found on her person or at the crime scene. The only indication of any sort of genital injury was a scratch on the right side of the labium and hymen measuring 1/2" by 1/8". According to a police report by Detective Weinbrecht, it was Dr. Fazekas's opinion that the abrasion may have been caused by a fingernail or a rough instrument, and may have been inflicted to mislead investigators into thinking a rape had been committed.

{¶ 14} Five days after the murder, on April 9, 1980, police interviewed Shirley Lucas, who was a housekeeper for Mercy Hospital. She stated that on Good Friday afternoon, April 4, 1980, Sister Pahl, who was "very serious about her religion", had been upset because "one of the priests" had shortened the Good Friday services. According to Lucas, Sister Pahl

had said to her, through tears, "Why did they cheat God out of what was his?[3]

{¶ 15} On or about April 13, 1980, police interviewed Wardell Langston, who was a janitor at the hospital. Langston reported to police at that time -- and later testified at trial -- that at approximately 7:30 a.m. he had been cleaning the floor under the balcony in the Professional Building, when he heard frantic footsteps coming from a hallway above, which connected to the chapel.[4] The footsteps were then

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[3]The record is unclear as to which priest Sister Pahl may have been upset with. Although Assistant Chaplain Father Swiatecki was the celebrant at the Good Friday services on the day before the homicide, appellant was the Senior Chaplain at the hospital.

[4]There was additional evidence that Margaret Warren, a receptionist who worked in the area where Langston heard the footsteps, herself heard frantic footsteps in the same portion of the building that morning. At the time of trial, however, Warren was deceased, and the only evidence of what she heard was contained in a police report from April 22, 1980. Both appellant and the state acknowledge that the April 22, 1980 police report has at least one factual error concerning the timing of events. That is, according to the police report, Warren stated that she arrived at work at 8:35 a.m. and heard footsteps at

heard to go around the balcony and down a second hallway which led to a single residence, the residence that was occupied by appellant.

{¶ 16} After 13 days of investigation, the police believed that the evidence pointed to appellant as the principal suspect. Appellant was asked to appear at the Toledo Police Department for an interview on April 18, 1980. During the interview, which was conducted by Lt. William Kina and Det. Marx, appellant claimed that Sister Pahl's killer came to him and confessed to her murder. When pressed for details and specifics, appellant admitted that his statement was a lie and that he had made up the story to protect himself.[5]

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approximately 8:50 a.m. But according to Warren's time card from that date, it is clear that she actually arrived at work at 7:35 a.m., an hour earlier than is stated in the police report. In light of this discrepancy, whether she meant to say that she heard footsteps at 7:50 a.m. or 8:50 a.m. is reasonably a matter of debate.

[5]Although Det. Marx's notes from the April 18, 1980 interview were missing at the time of trial, evidence in the form of a polygraph examination request that he had completed on April 19, 1980, corroborated his account of appellant's statements regarding the

{¶ 17} At the conclusion of the interview, appellant consented to a search of his residence. During the search, police recovered an eight-inch long sword-shaped letter opener. The blade of the letter opener was approximately 1/2" wide. Near the handle of the letter opener was a nickel-sized circular medallion with an embossed depiction of the United States Capitol.

{¶ 18} Appellant was interviewed again on April 19, 1980. The interview came to an abrupt end when Toledo Police Deputy Chief Ray Vetter, himself a practicing Catholic, intruded upon the session and brought Monsignor Schmit of the Toledo Diocese into the interrogation room. Within minutes, appellant and Monsignor Schmit simply walked out of the police station. Both Marx and Kina testified that an interruption in a police interview such as had occurred during appellant's April 19, 1980 interview was highly unusual, and in the case of the April 19, 1980 interview, was highly unwelcome.

{¶ 19} Not only was the April 19, 1980 interview cut short, but any police notes from that interview, and from the interview of April 18, 1980,

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alleged confession.

have been lost or are no longer in existence. Det. Marx testified that he was certain he had made reports of those interviews back in 1980, but he could not explain what may have happened to them or when it may have happened. Dep. Chief Vetter testified that in 1980, at that time the missing police reports would have been generated, there would have been three copies of each report -- "an original and two carbons" -- and that the officer who made the report would keep one copy, the officer's captain would keep the other copy, and the original would go to Vetter. According to Lt. Kina, at the time the April 18 and 19, 1980 interviews were conducted, Dep. Chief Vetter had a locked cabinet where he would keep all three copies of police reports involving "very sensitive cases."

{¶ 20} During the initial weeks following Sister Pahl's murder, police followed up on the report about scissors being missing from the chapel sacristy. Sister Kathleen Mary showed police a pair of scissors similar to the missing pair, and on April 22, 1980, Detective David Weinbrecht showed the sample scissors to Dr. Fazekas. According to Det. Weinbrecht's report:

{¶ 21} "The opinion of [Fazekas] is that the scissors very well could have been the weapon, but

would not say with 100% certainty. She stated that some of the punctures on the body appeared to be made with the scissors closed and some with the scissors open. The neck wounds appeared to be made with the scissors open. The stated that the wounds on the victim's face appeared to have been made with a weapon, sharper than the scissors."

{¶ 22} Several days later, Det. Weinbrecht showed Dr. Fazekas the sword-shaped letter opener that was recovered from appellant's room. According to the detective's April 25, 1980 report, Dr. Fazekas's conclusion was that "the instrument was compatible with each of the wounds found in the body and could have been the weapon used."

{¶ 23} Two days before Dr. Fazekas was shown the letter opener, Toledo Police Senior Criminologist Edward Joshua Franks had performed his own examination of the instrument. At trial, Franks described the letter opener as having been "... sumptuously clean .... It didn't have any fingerprints, no stains, no smear marks ... -- it appeared as if it had been polished." When he removed the medallion, however, he found a small particle of material which, when tested using the chemical phenolphthalein, tested presumptively positive for the presence of blood. Because of the small amount of available

material, Franks was unable to conduct a further test to confirm the presumptive test result.

{¶ 24} Near the end of April 1980, Toledo police presented their evidence to the Lucas County Prosecutor's office. The prosecutor's office declined to present the matter to the grand jury at that time because the evidence was deemed insufficient.

{¶ 25} According to Det. Marx, for months after April 1980 -- even years, periodically -- the Toledo Police Department continued to try to develop further evidence in the case.

{¶ 26} In December 1999, the Toledo police submitted the letter opener to the Ohio Bureau of Criminal Identification and Investigation (BCI), where forensic scientist Cassandra Agosti performed a presumptive blood test using the chemical tetramethylbenzidine. A swab from the area surrounding the medallion tested presumptively positive for the presence of blood.

{¶ 27} In 2000, BCI forensic scientist Diane Gehres performed PCR and STR DNA analysis on two swabs from the medallion, but no DNA was detected.

{¶ 28} On December 2,2003, the case caught the attention of Toledo Police Department Cold Case Unit investigators. Cold case investigator Thomas

Ross testified that the purpose of the cold case unit is to apply new technology to old, unsolved cases and, through the collaborative effort of a multi-discipline task force, attempt to bring those cases to a successful conclusion. Members of the cold case unit who took part in investigating the instant case included, in addition to investigator Ross of the Lucas County Prosecutor's Office, Sgt. Steve Forrester of the Toledo police, forensic pathologist Diane Scala-Barnett, members of the Bowling Green BCI DNA team, including forensic scientists Agosti and Gehres, and forensic anthropologists Dr. Frank Saul and Julie Saul.

{¶ 29} What brought the case to the attention of the cold case unit in December 2004 was a letter, originally sent to the Ohio Attorney General's Office.[6] On December 8, 2003, investigators interviewed the person who had sent the letter to the Attorney

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[6]The contents of the letter were discussed on the record between counsel and the judge, out of the presence of the jury. According to these discussions, a nun had alleged in the letter that she had been victim of ritualistic sexual abuse performed by multiple individuals. The group sex allegations did not include appellant. However, the letter did accuse appellant of individual sadomasochistic sexual abuse.

General's Office. During this interview, the author of the letter advised the police that they should look for an upside down cross on Sister Pahl's chest.

{¶ 30} In the months that followed, investigators located and examined the physical evidence, interviewed original investigating officers, re-interviewed witnesses, and had physical evidence examined by specialized experts.

{¶ 31} Deputy Lucas County Coroner and forensic pathologist, Dr. Diane Scala-Barnett, testified that after looking at Dr. Fazekas's autopsy body diagrams of Sister Pahl and at the original report of Sister Pahl's autopsy -- which had been authored by Dr. Fazekas – it was her opinion that the strangulation that occurred in this case was not manual, by someone with "large hands," as had been initially suggested by Dr. Fazekas prior to conducting the autopsy, but, rather, was more likely a soft ligature strangulation. Dr. Scala-Barnett observed that hands are never mentioned as the instruments of strangulation in the original autopsy report. Indeed, Dr. Fazekas's report, which describes numerous physical findings that suggest that Sister Pahl was strangled, contains no comment as to how the strangulation may have been accomplished. According to Dr. Scala-Barnett, when the method of

strangulation is found to be hands, the term "manual strangulation" is generally specified in the autopsy report.

{¶ 32} That Dr. Fazekas had likely abandoned her initial notion that the strangulation was manual and had been perpetrated by someone with big hands can also be found in an April 14, 1980 police report containing a subsequent opinion by Fazekas that the crime could have been committed by either a man or a woman.

{¶ 33} When discussing a cluster of six stab wounds to Sister Pahl's face, Dr. Scala-Barnett noted that Dr. Fazekas had described the wounds as having edges that were "sharp." According to Dr. Scala-Barnett, the fact that the edges were sharp ruled out scissors as the murder weapon, because scissors, which have one blunt edge and one sharp edge, would leave a different kind of pattern. She added that scissors would also leave an abrasion where the blunt side entered the skin, and that no such abrasions were described in Dr. Fazekas's report.

{¶ 34} According to Dr. Scala-Barnett, variations in the appearance of Sister Pahl's wounds were due to the lines of cleavage in her skin and the different angles at which the weapon was inserted.

{¶ 35} On February 27, 2004, Det. Cousino examined the letter opener together with the altar cloth to determine whether any of the bloodstains on the cloth were consistent with the weapon. He found several stains that he thought were consistent with the curve and shape of the letter opener, including the blade, the ribbed handle and the handle's decorative knob.

{¶ 36} Det. Cousino also examined the puncture defects in the altar cloth. He discovered among the stab marks in the portion of the altar cloth that had covered Sister Pahl's chest, nine precisely aligned stab marks that marked the outline of an upside down cross.[7] Det. Cousino testified that the puncture marks had an unusual Y-shape that was consistent with the size and shape of the letter opener's unique four-sided blade.

{¶ 37} He stated that a cross-section of the four-sided blade would show a diamond or kite shape, and he described the blade itself as one that starts from a point and gets progressively wider up to the handle. Speaking to the unique nature of the blade,

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[7]The altar cloth, when unfolded, actually shows 18 stab marks, essentially marking two mirror-image crosses. This is because, at the time Sister Pahl was stabbed, the altar cloth was folded in half.

Cousino testified that he had searched for letter openers with similar blades by looking online, contacting letter opener collectors, and taking books out from the library. After looking at pictures of thousands of letter openers, he never found one even similar to the letter opener in question.

{¶ 38} In March 2004, Det. Cousino performed a third presumptive test for blood, this time using the chemicalluminol. He applied the chemical to the portion of the letter opener where the medallion had been affixed, and got a "very tiny" positive reaction.

{¶ 39} That same month, Toledo police brought the altar cloth and letter opener to forensic scientist T. Paulette Sutton, an expert on bloodstain pattern analysis. At trial, Sutton testified that the letter opener was consistent with being the object that created eight separate patterns on the altar cloth. She testified that one stain in particular was consistent in size and shape with the U.S. Capitol depiction on the letter opener's medallion. When asked whether another object could have made the same mark, she answered, "If another object made it, it would have had to have been basically the same shape, the same size, and the same configuration. So if there's another object like that, sure."

{¶ 40} Sutton also testified regarding a circular bloodstain on Sister Pahl's forehead that can be seen in the post-mortem photographs. After measuring the stain and comparing it with the letter opener, Sutton determined that the forehead stain was consistent, in size and shape, with a raised circular surface located near the letter opener's hilt.

{¶ 41} On April 23, 2004, at approximately 3:30 p.m., investigator Ross and Sgt. Forrester went to appellant's home to interview appellant and conduct a search of his premises. They arrived in an unmarked car, and parked in appellant's driveway. The officers, wearing plainclothes, knocked on the door. When appellant answered, the officers identified themselves as investigators with the cold case squad and presented appellant with a business card. They then indicated to appellant that they wanted to question him about certain statements that appellant had made to police in 1980 in connection with the investigation of the death of Sister Pahl.

{¶ 42} Appellant invited the officers into his residence and offered them seats in the living room. The officers interviewed appellant in the living room for 45 - 60 minutes. Thereafter, Ross indicated to appellant that he wanted to show him a number of

photographs. Appellant suggested that the kitchen table would be a good place to do that. Ross accompanied appellant to the kitchen table. There, he displayed the photographs and continued the interview with appellant for an additional 15 - 30 minutes.

{¶ 43} During the questioning, appellant told the investigators that when he had arrived at the sacristy on the day of the murder, Father Swiatecki had looked at him and said, "You killed her. Why did you kill her?" Appellant stated that he made no response to this allegation.

{¶ 44} Appellant also stated that he had never loaned the letter opener to anyone, that he had never cut himself with it and that he had always locked his apartment door.

{¶ 45} In addition, appellant claimed that he never had a key to the sacristy because he had no reason to go into this room. Sgt. Forrester stated that, as a Catholic and former altar boy himself, he found it curious that appellant would not have reason to go into the sacristy. According to Sgt. Forrester, the sacristy is where the priest changes and gets ready for mass. At the conclusion of the interview, appellant was arrested and, days later, the indictment was returned.

{¶ 46} On May 20, 2004, Sister Pahl's body was exhumed. A second autopsy was performed, this time by Dr. Scala-Barnett, and a DNA standard was extracted. Several days later, anthropologist Julie Saul examined a piece of Sister Pahl's mandible and found that it contained a small, diamond-shaped defect. From this examination, Saul was able to discern that the tip of the weapon that caused the defect had a point; that the weapon had to be fairly sturdy in order to puncture the hard, dense bone of the mandible; and that the weapon had a "rounded flattened diamond shape at the tip cross section."

{¶ 47} On June 7, 2004, Det. Cousino brought the letter opener to the Lucas County Coroner's office. Dr. Scala-Barnett and Julie Saul compared the weapon to the defect in Sister Pahl's mandible, and concluded that they were consistent with one another. Next, with Det. Cousino, Sgt. Forrester, investigator Ross, and prosecutor Tim Braun all in attendance, they inserted the tip of the letter opener into the defect. According to Dr. Scala-Barnett, "it was a perfect fit," and, in her opinion, the letter opener, or a weapon exactly like it, caused Sister Pahl's injuries.

{¶ 48} Saul confirmed Dr. Scala-Barnett's findings, stating that when the blade was placed into

the defect, "it just seemed to lock in place". Saul also testified that the blade fit "quite well" in a defect found in the victim's sternum and was also "very consistent with" a puncture found in the victim's cervical vertebra.

{¶ 49} During the state's rebuttal, Dr. Scala-Barnett demonstrated to the jury the different wound patterns that would be caused by the letter opener as compared to a pair of scissors. She did this by placing the end of the letter opener in one disk of clay and by placing the end of a pair of scissors in another. She indicated to the jury that where the letter opener was placed in clay, all of the edges in the clay were sharp, "like a little diamond." Where a pair of scissors was placed in clay, however, there was a sharp edge and a square edge, with the square edge resulting from the dull, non-cutting part of the scissors.

{¶ 50} In August 2004, the state contacted forensic scientist Henry Lee, Ph.D. to obtain a reconstruction of the crime scene. Dr. Lee reviewed photographs, crime scene reports, and the medical examiner's report. He also made a personal inspection of the Mercy Hospital chapel and various items of evidence, including the altar cloth. Among Dr. Lee's conclusions was that, at the time of the

attack, Sister Pahl was likely disabled or knocked down pretty quickly on the floor, and then, without much of a struggle, she was stabbed. He also concluded, based on a relative absence of blood that could be seen in the photographs, that there may have been an additional cause of death involved besides stabbing. Finally, he opined that following the stabbing, the body and face had been moved, and that the crime scene could have been staged by the assailant.

{¶ 51} Dr. Lee also testified about blood transfer patterns. He spoke in particular about the same altar cloth stain that was singled out for discussion by forensic scientist Sutton. Dr. Lee described the stain as having a rectangular component and a semicircular component - "like a medallion type of a pattern." When he compared the stain to the letter opener's medallion, he determined that the two were consistent, and that the medallion could not be excluded as the object that made the stain.

{¶ 52} In response to the entirety of the state's expert blood transfer evidence and testimony, defense counsel John Thebes, with tracing paper, rendered his own tracing of one of the bloodstains on the altar cloth. Forensic scientist Sutton acknowledged on

cross-examination that the tracing resembled a pair of scissors.

{¶ 53} In January 2005, forensic anthropologist Steven Symes, Ph.D., an expert on bone trauma analysis, examined, photographed and measured the letter opener and the piece of Sister Pahl's mandible that contained the diamond-shaped defect. He also made lightweight, hard plastic casts of the two articles. When he inserted the cast of the letter opener into the cast of the defect, he found that the letter opener slipped in and fit very well. Symes testified that his tests indicated that the mandible defect was created by a tool similar in size and shape to the letter opener.

{¶ 54} Symes noted that, as a class project, he and some students had tested close to ten different kinds of scissors -- including medical scissors, secretarial scissors, and office scissors -- in balsa wood. The scissors were tested at different depths, in open and closed positions, but none of the scissors made a defect similar to the one found in Sister Pahl's mandible.

{¶ 55} In response to the state's expert bone trauma evidence and testimony, appellant introduced his own expert testimony by anthropologist Kathleen Reichs, Ph.D. Dr. Reichs testified that in conducting

her analysis, she had examined various photographic images and reviewed various reports, including a supplemental crime report by Det. Marx, Dr. Fazekas's coroner's report, a laboratory report by Daniel Davison, a report of exhumation and second autopsy by Diana Scala-Barnett, a report of skeletal analysis by Julie Saul and Frank Saul, and a report of osteological examination by Steven Symes. Of note is that Dr. Reichs never examined the mandible bone itself.

{¶ 56} As a result of her analysis, Dr. Reichs concluded that the test fit of the letter opener into the mandible defect potentially could have done something to alter the bone defect. But she could not say with any degree of scientific certainty that the test fit did, in fact, alter the bone defect.

{¶ 57} Part of the state's efforts to glean information in this case included the use of DNA testing. In July 2004, BCI forensic scientist Agosti performed STR and PCR DNA analysis on Sister Pahl's underwear and on the altar cloth. Agosti detected a mixture of DNA on the underwear. She identified Sister Pahl as one contributor to the mixture. She stated that another contributor to the mixture had to be a male, but the sample showing

that result was so small as to be below reporting standards.

{¶ 58} Agosti also detected a mixture on the altar cloth, with Sister Pahl being one contributor to the mixture. That result was later changed, in August 2005, by BCI forensic scientist Elizabeth Benzinger. The change was made to reflect a new way that DNA was being interpreted. According to Benzinger, what Agosti had recorded as two DNA alleles "actually represented background noise and were not true DNA types." Therefore, following the new interpretation, the only DNA type that was found on the altar cloth was one consistent with Sister Pahl.

{¶ 59} Agosti compared the samples from the underwear and altar cloth to a standard for appellant. With respect to all of those samples, appellant was excluded as being a contributor.

{¶ 60} In 2005, BCI forensic scientist Gehres performed RT PCR DNA testing on three additional samples from the altar cloth. As to two of the samples, she got a partial type, and as to the third sample she got no result. She testified that although she would normally expect to get full profiles with the amount of DNA that was quantitated, the fact that she got only partial profiles was due to the degraded

condition of the DNA. She further testified that when she compared the DNA profiles from the altar cloth to a standard from Sister Pahl, she found no DNA type foreign to Sister Pahl.

{¶ 61} Gehres next obtained and tested DNA standards for every person the state could locate who had had contact with the evidence or who had been in the sacristy with the victim. Among the standards tested was one for Father Swiatecki. Gehres compared each of the standards to the male DNA obtained from Sister Pahl's underwear. None was a match.

{¶ 62} Also in 2005, the state commissioned DNA experts from a company called ReliaGene Technology to conduct Y-chromosome testing of fingernail clippings that had been taken from Sister Pahl's body. The clippings were swabbed and tested for the presence of blood, and at least one of them tested positive. The blood was not appellant's. A small amount of DNA was extracted from the clippings. As with the blood, the DNA was excluded as being appellant's.

{¶ 63} In addition to the scientific evidence, the state provided eyewitness evidence to establish its case. Eyewitness evidence going to the timing of events was as follows. Sister Pahl was last seen alive

at approximately 6:50 a.m., on April 5, 1980, when ambulance driver Jerry Tressler passed her in a hospital hallway.[8]

{¶ 64} At approximately 7:00 a.m., hospital security guard Robert Wodarski noticed that the chapel doors were open, and the light was on. Minutes later, Nursing Supervisor Rose Byers observed that the chapel doors were locked.[9]

{¶ 65} At some time between 7:15 a.m. and 7:30 a.m. that morning, Sister Madelyn Marie Gordon entered the hospital chapel. She said her morning prayers, and then went to work arranging music for the afternoon service. After 8:00 a.m., she

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[8] Audrey Garraway, a dietary assistant, had seen Sister Pahl some minutes earlier, at approximately 6:15 a.m., in the nuns' dining room.

[9]Byers, who worked the 11 p.m. to 7 a.m. shift at the hospital, testified at trial that on April 5, 1980, she followed the same routine she had followed for the past 18 to 20 years. That is, at the end of her shift, she took the report from that shift, dropped it off at Sister Gerold's office, then went to the chapel for a few minutes to say a prayer. Byers recalled that on April 5, 1980, for the first, and only, time during her tenure with Mercy Hospital, she was unable to get into the chapel after dropping off the report because the chapel doors were locked.

went to the sacristy to use the telephone. Using her key, she unlocked the sacristy door and entered the room. There, she discovered the lifeless body of Sister Pahl. Sister Gordon's screams were heard by EKG technician Leslie Kerner sometime between 8:00 and 8:15 a.m.

{¶ 66} Appellant's alibi, throughout the proceedings, was that on the morning of April 5, 1980, until after the body was discovered, he had been in his living quarters. At trial, the testimony of several hospital employees conflicted with this account of appellant's whereabouts.

{¶ 67} Leslie Kerner testified that she had been working at Mercy Hospital for several years prior to April 1980 and had seen appellant almost daily. She recalled that on April 5, 1980, she arrived at work between 6:50 and 7:00 a.m., as was her habit and routine. She further recalled that, as she was walking to her office after clocking in to work that day, she observed appellant, wearing dark clothing, by the doors of the chapel.

{¶ 68} Kerner testified that when police first interviewed her, in April 1980, they asked her if she had seen anything unusual on the day of the murder. Because she did not think there was anything unusual about appellant being present at the chapel

at 7:00 a.m., she answered that she had not. She did, however, tell her then fiance (and at the time of trial, ex-husband), Richard Kerner, that she had seen a priest near the chapel.[10] In 2005, after having watched a televised story about Sister Pahl's unsolved murder, Leslie Kerner called the Lucas County Prosecutor's Office to let authorities know all that she had seen that day.

{¶ 69} Grace Jones was employed by Mercy Hospital on April 5, 1980, and worked in the lab. She stated that she saw appellant at the chapel doors at some time after 7:00 a.m., but before Sister Pahl's body was found. At the time she saw appellant, Jones was in the hallway near the chapel, where she had gone to get a newspaper. Jones testified that while waiting for the elevator in the hallway, she saw appellant come out of the door to the chapel. She testified that appellant walked by her and that they nodded to each other. She said that at the time of the encounter, appellant was wearing a black robe and a small cap, and was carrying a dark colored bag. Her best recollection as to the time that she saw appellant was about 30 minutes after her co-worker,

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[10] At trial, Richard Kerner corroborated Leslie Kerner's testimony about what she had told him in April 1980.

John Teems, got off work. John Teems' shift was from 11:00 p.m. to 7:00 a.m.[11]

{¶ 70} There was also testimony by Dr. Jack Baron, who had been the chief resident at Mercy Hospital on April 5, 1980. According to Dr. Baron, while he was running to the chapel in response to the emergency call for aid to Sister Pahl, he passed an individual dressed as a priest, who appeared to be between 35 and 45 years of age, was 5'7" - 5'8" tall, with a medium build and dark hair. While Dr. Baron did not identify this person to be appellant, he did testify that it was not the other priest, Father Swiatecki, whom he knew quite well. Father Swiatecki weighed between 250-260 pounds. Appellant, in 1980, was in his early 40's, was 5'7" tall, weighed 160-165 pounds, and had dark hair.

{¶ 71} Wardell Langston, the janitor who, in 1980, had spoken to police about hearing frantic footsteps at about 7:30 a.m. on the day of the murder,

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[11] At trial, retired Toledo Police Sgt. Ulysses Howard testified that Grace Jones had told him within a year of the homicide that on the day of the homicide, while she was waiting for the elevator, she had seen a priest coming from the area of the chapel, carrying a bag.

testified at trial that the sound of the footsteps -- that came from the hallway connecting to the chapel, then made their way around the balcony to another hallway, at the end of which was appellant's residence -- was loud, and made him think that something was wrong. The residence toward which the footsteps were heard to go was the same place that appellant claimed to have been until after Sister Pahl's murder.[12]

{¶ 72} Other testimony contradicted appellant's statements to police that he had no key to the sacristy door and that he had no reason to go into the sacristy. Sister Phyllis Ann Gerold and Sister Gordon both testified that appellant, as a priest, would have

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[12]The evidence showed that appellant lived on the same level of the hospital as the chapel, but in a different structure called the Professional Building. The hospital, where the chapel was housed, and the Professional Building were connected by a short enclosed footbridge. When Langston heard the footsteps, he was cleaning the floor under the balcony in the Professional Building. From the lobby of the Professional Building, one could look up to the balcony which overhung part of the lobby. Located near this balcony was appellant's apartment. Because April 5, 1980 was Holy Saturday, the Professional Building was essentially devoid of occupants.

had his own key to the sacristy. When Sister Gordon was asked why the priests would have keys to the sacristy, she answered, "They often have to go in there, and if maybe somebody would want communion outside of the normal times, or to check on most anything, they would have to have access to it."

{¶ 73} In 2004, appellant repeatedly described his actions after being informed of Sister Pahl's death as quickly dressing from his morning shower and then "running" to the chapel.[13] However, when confronted with statements by witnesses who said that they heard the sounds of running footsteps in appellant's hallway on the morning of the murder before Sister Pahl's body was discovered, appellant changed his story to say he could not have run, due to the length of his cassock.

{¶ 74} Because appellant's letter opener was determined to be the murder weapon, access to

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[13] Although appellant told police in 2004 that he was dripping wet from his morning shower when he answered the telephone and received news of Sister Pahl's murder, in 1980 he claimed that he was just finishing getting dressed when he answered the telephone and received the news of Sister Pahl's death.

appellant's personal residence became a factor. In 2004, appellant tried to convince police that he kept his door unlocked and that anyone could have entered his residence. He later conceded that, in fact, he kept his apartment locked.

{¶ 75} As indicated above, 71-year old Sister Pahl was found in a state of near nudity. Her overgarments had been pulled up to her chest, and her undergarments had been pulled down to and off of one foot. Yet, investigators found no evidence of semen and the victim's hymen was intact - although the autopsy did note an abrasion to the victim's labium and hymen.

{¶ 76} Sister Pahl's body had been placed so that her legs were straight and together, her arms were by her sides, and her head was straight and looking up. Nine stab marks were evenly placed in the shape of a cross on the altar cloth - so evenly, in fact, that Det. Cousino believed the assailant had likely used some kind of a template while inflicting them. In addition, the victim had a smear of blood on her forehead, between her eyes, yet there was no wound or scratch to her forehead to account for this blood.

{¶ 77} Investigators had concluded there was no robbery, and it was likely that the assailant and victim were not strangers to one another.

{¶ 78} In an effort to determine whether any of these facts and other circumstances at the scene had relevant significance, investigators contacted Father Jeffrey Grob of the Chicago Archdiocese. Father Grob testified that he was employed by the Archdiocese of Chicago as an associate vicar for canonical services. As such, he was the principal point of contact for the 317 parishes in the diocese in regard to questions involving church law. He was also involved in the field of providing imprimaturs, the Catholic Church's seal of approval for books. He further indicated that he was a trained canon lawyer as well as a judge on the diocesan court of appeals. Additionally, Father Grob was the assistant to the exorcist for the Archdiocese of Chicago. As such, he was the first point of contact for anyone who might call regarding the occult or other related matter.

{¶ 79} Father Grob testified that he was familiar with the rituals of the Catholic Church as well as other rituals not of Catholic origin. It was Father Grob's opinion that Sister Pahl's killer would have to have been someone with specialized knowledge of Catholic ritual, such as a religious

sister, a seminarian, or a priest. Father Grob opined that much of what occurred to the victim was an attempt to mock and degrade her. He based his opinion on several facts in evidence from the crime scene, including the finding of an inverted cross punctured upon the altar cloth which had covered the victim; that the victim was covered with an altar cloth prior to any stabbing; that her forehead was anointed or marked with blood; that there was indication of some vaginal penetration; and that all of this occurred in the presence of the Eucharist, which Catholics believe is the actual body of Christ.

{¶ 80} At the time of the homicide, everyone in the hospital with relevant religious knowledge was accounted for, except for appellant.[14]

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[14]Sister Gordon testified at trial that she, in the company of other nuns, saw Father Swiatecki in the cafeteria at the time of the homicide. She further testified that after breakfast, she and one or two other nuns -- together with Father Swiatecki – left the dining room and started heading toward the chapel.

In addition, testimony by Sgt. Forrester established that the whereabouts of all of the nuns had been satisfactorily accounted for by other witnesses.

{¶ 81} Statements by appellant, himself, established that he may have been less than content working with the nuns at Mercy Hospital. Sister Gordon testified that appellant had twice expressed a desire to be a military chaplain, and that such desire was never fulfilled. In addition, appellant -- the hospital's Senior Chaplain -- in his taped interview with police, referred to Mercy as "their [the nuns'] hospital."

{¶ 82} Evidence about Sister Pahl's demeanor and personality was also presented. She was variously described by witnesses as a "perfectionist," and as one who could be "very, very strict," "very stern." "Things had to be done a certain way;" if not, "[t]hen she would come and tell you." She did not hesitate to state her opinions. Appellant described Sister Pahl as having a dominant personality.

{¶ 83} Shirley Lucas, the housekeeper who had met with Sister Pahl on the Good Friday before her death, testified as follows regarding the details of that encounter. On April 4, 1980, Lucas met with Sister Pahl in the chapel to get the key to clean the convent. When Sister Paul gave Lucas the key, she stated that she was waiting to speak to "Father" about the changes he wanted to make for Easter Services. After her cleaning duties were finished,

Lucas returned the key to Sister Pahl. It was at that point that Sister Pahl, literally in tears, cried, "Why do they cheat God out of what belongs to Him?" Lucas did not know which of the two priests Sister Pahl had been referring to.[15] The next morning, Sister Pahl was found dead in the chapel sacristy.

{¶ 84} During the state's closing arguments, the state made a suggestion to the jury, based on the evidence, as to why the crime might have occurred.[16] Specifically, the state argued:

{¶ 85} "You listened to this evidence. You heard what took place in the sacristy. Is this some sort of satanic cult killing? No. Was this part of some ritualistic black mass? No. Sorry to disappoint. This case is about perhaps the most common scenario there is for a homicide. A man got very angry at a woman, and the woman died. The only thing different is the man wore a white collar, and the woman wore a habit."

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[15]See footnote 3, *supra*.

[16]In doing so, the state emphasized that showing why the crime might have occurred was not part of its burden of proof.

{¶ 86} In describing the ritualized nature of the attack, the state argued that appellant, after choking Sister Pahl to the brink of death, performed last rites:

{¶ 87} "What do you do over the dead or dying? You perform last rites. And that's what he did. Oh, a bastardized version of last rights to be sure, but that is what happens. He covers her with that blessed altar cloth, and he marks her with the sign of the cross, but an upside down cross. Why? Father Grob told us why. To degrade her. To mock her. To humiliate her. To bring her down to the lowest point he possibly could. He marks her with an upside down cross in front of the Eucharist, the very person of Jesus Christ to whom she is wed. He carves that in her. Does that make him a Satanist? No. It she'd have been Jewish, he would have carved a Swastika in her chest. It was how he could humiliate her most.

{¶ 88} "And then is he done after that? No. No. There's more to do. What can we do? Well, you have to anoint her. What would be the worst possible way? What would be the most offensive way to do that? Well, with blood, her own blood. So he pulls off that altar cloth and he stabs her to get her blood.

{¶ 89} "* * *

{¶ 90} "Well, that should be enough, shouldn't it? Isn't that enough humiliation for one murder? No.

It's not enough. We have to do more. What else can we do? We'll strip her. We'll strip her naked, that's what we'll do. We'll roll up that smock. We'll take that girdle down. We'll leave her naked in front of the Blessed Sacrament. Is that enough? No. Even that is not enough. And we know that he does more. Imagine what it took to pull that girdle down off a dead body. Why is he doing all that? Notice this picture. Notice that the girdle is actually off her left foot. Her shoe is still on. But for some reason he struggles to get it off and free up that leg so it wouldn't be bound together to the other one.

{¶ 91} "Why would he do that? Well, for the final act of the degradation, the final act of humiliation. He needs to free that leg. He needs access, cause he wants to penetrate her. With the blade? With the crucifix? With his finger? We don't know. It doesn't matter. But he does it, and we know because in the autopsy report you will find that this virginal nun had a red scratch inside her.

{¶ 92} "And so he finishes, and he straightens up her body. Just like Phyllis Ann said, it looked posed to her. People don't die straight like that. And he stands up, and he looks at his work, and what is it that he has left there on the floor? He's left a message to Sister Margaret Ann Pahl? To be sure. Maybe to

the church. Maybe to God himself. See how angry I am. See what you have made me do. This is how angry I am. He left a message for everyone to see."

{¶ 93} At the beginning of the rebuttal portion of the state's closing argument, the state commented -- apparently in response to defense counsel's closing argument that one of the blood stains on the altar cloth could have come from a nickel because "a picture of Congress" is on the back of a nickel-- "[I]f you see [defense counsel] John Thebes on the street, do not take a nickel from him because the Capitol Building is not on the back of a nickel. The Monticello is." Thebes countered this comment by joking, "I only have dollar bills. "

{¶ 94} Also during the rebuttal portion of the state's closing argument, the state commented on the relevance of the DNA evidence in the case. The state began by pointing out that the amount of DNA that had been available for testing in this case was merely "trace," and that back in 1980 -- when DNA testing was not yet available -precautions were not taken at crime scenes to protect trace DNA evidence against contamination by those who were investigating the scene.

{¶ 95} Next, the state highlighted the fact that the DNA that was available for testing in this case

was highly degraded after 24 years and, thus, was of poor quality. Summing up its assessment of the value of the DNA evidence in this case, the state argued:

{¶ 96} "So in every case when you have DNA evidence, and it is powerful if you have it in enough quantity and if the context is correct, it can be very powerful evidence. But in this case, I don't think it proves or disproves anything. In fact, if it turned out, let's say, for argument's sake that it did come back to Father or Gerald Robinson, if it came back as his DNA, his argument would be the same thing I'm telling you right now, is that this is trace. He was in that sacristy on numerous occasions, and he actually went down there at some point then during the course of the day, that his DNA could have gotten on her by him just standing over her. So, if both sides can make that argument, it's basically a wash because it doesn't prove or disprove anything.

{¶ 97} "But we have a situation with a homicide crime scene is more than 26 years ago today. But when we get the DNA testing was 24 years ago, they did not take the precautions necessary at that point in time because DNA didn't exist. They didn't even know that you can actually get trace amounts of DNA to where they protected the crime scene. They didn't know it at the coroner's

office. They didn't know it at the labs. Nobody knew to take the adequate precautions to protect scenes so they are not contaminated and that there is actually legitimate evidence that can actually tie the DNA to the crime scene.

{¶ 98} "And I have the definition up here of relevancy that we deal with as lawyers is that, 'relevant evidence means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' This is just not relevant evidence. It doesn't prove it either way. Doesn't help the defense. It doesn't help the State. It's because it's such a small amount it literally could have come from anywhere."

{¶ 99} After summarizing the expert forensic testimony that had been presented by the state to show that the letter opener was the weapon in this case, the state remarked upon defense counsel's attempt to show that it was not the letter opener, but a pair of scissors that caused Sister Pahl's injuries:

{¶ 100} "It can't be the scissors. The image on the altar cloth just above the hand guard is inconsistent with scissors, the distance between the scissors and the thumb guard, and what I'm going to do is -- Mr. Thebes' drawing has no basis in scientific

theory. He just decided to trace the letter opener. There's no science behind what he did, and something that maybe a third-grade class could do to say we have the stain, could you make it look like scissors. But just looking at this, you could determine it can't be scissors. Because if he's saying that this area, the absence of blood in that particular area is a pin that's there, it renders this unable to be scissors. Let me demonstrate for you. The whole concept with scissors is that they're fulcrums. They have to be able to go like this. If you see these scissors, you can see where the fulcrum is and how the distance it is from the handle. It's got to be a certain distance away from it. If you take this circle area here, it's too close to the handle. It would not be able to open the scissors based upon this. So there's no validity to this little test that he did with his little comparison that he made and it probably ought to go back to a third-grade class where it belongs."

{¶ 101} At one point, the State, while addressing the testimony of defense expert Kathleen Reichs, Ph.D., showed the jury a chart that referred to her as a "hired gun." In discussing her testimony, the state provided:

{¶ 102} "Then they called Kathy Reichs to testify. And her testimony was pretty poor. She

talked about she had sort of two personalities. She had Katherine Reichs, Ph.D., that she's the forensic anthropologist, and when she's the novelist, she's Kathy Reichs. Well, I think we just heard the testimony of Kathy because she did absolutely no science. I think the telling point was what Dr. Barnett talked about, is that scientists do not presume, and that's exactly what she did. She never examined anything. She never did anything. They talk about trust. Would you go to a doctor that would not even look at you? She didn't look at the evidence. They talk about that they weren't at the exhumation. * * * They talk about they were not allowed to go to the exhumation. The evidence from the exhumation is still at the coroner's office. It's always been there available for review. She's refused to review the evidence. First and only time she's ever testified from photographs was in this court. Nowhere else. Clearly improper. Unethical. Never conferred with the experts who actually did the testing. She knows those people. She didn't say, well, how did you do this, what test did you conduct? I mean, she's not in a situation where they're adverse parties. We're here for a search for the truth and she could've explained a lot to you, but she decided not to be able to do that for you. And her opinion is based upon the term of

could have. And she failed to follow her own replication and protocol. She did nothing. So I don't think she really adds anything to this particular case."

{¶ 103} The state's final closing words were as follows:

{¶ 104} "Mr. Mandross talked about in opening statements that you can't not talk about God and religion in this particular case because you have a Catholic priest and a nun involved in this. But this is a court of law, and the laws that apply here are the laws of man. Gerald Robinson may be judged by some other authority at a later date, but the focus of -- the focus of judgment -- but this is focus of judgment of man's law, and he's up for judgment today with you.

{¶ 105} "Based upon man's law, the State of Ohio has proven its case beyond a reasonable doubt. I submit to you that your verdict of guilty will finally bring justice to the bride of Christ, Sister Margaret Ann Pahl."

{¶ 106} At the end of appellant's trial, on May 11, 2006, the jury returned a unanimous verdict of guilty on the amended charge of murder.

{¶ 107} Appellant filed a timely appeal of his conviction, raising the following assignments of error:

{¶ 108} "THE 24-YEAR PRE-ACCUSATION DELAY IN THE COMMENCEMENT OF THIS ACTION DEPRIVED APPELLANT OF DUE PROCESS OF LAW UNDER THE OHIO AND UNITED STATES CONSTITUTIONS BECAUSE APPELLANT SUFFERED ACTUAL SUBSTANTIAL PREJUDICE AND THE STATE OF OHIO'S DELAY IN THE PROSECUTION WAS UNJUSTIFIED."

{¶ 109} "APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE OHIO AND UNITED STATES CONSTITUTIONS WHEN COUNSEL INEXPLICABLY FAILED TO COMPETENTLY ARTICULATE THE MOST CRITICAL LEGAL ISSUE PRESENTED BY THE FACTS OF THIS CASE IN PRE-TRIAL MOTION PRACTICE."

{¶ 110} "THE STATE OF OHIO'S INJECTION OF 'SATANISM' INTO THE CRIMINAL PROCESS EVISCERATED APPELLANT'S RIGHT TO A FAIR TRIAL UNDER THE OHIO AND UNITED STATES CONSTITUTIONS."

{¶ 111} "THE JURY'S FINDING ON THE ELEMENT OF IDENTITY WAS CONTRARY TO THE MANIFEST WEIGHT OF THE CREDIBLE EVIDENCE PRESENTED."

{¶ 112} "APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE OHIO AND UNITED STATES CONSTITUTIONS THROUGHOUT THE COURSE OF HIS TRIAL."

{¶ 113} "APPELLANT'S RIGHT TO A FAIR TRIAL UNDER THE OHIO AND UNITED STATES CONSTITUTIONS WAS COMPROMISED BY PREJUDICIAL PROSECUTORIAL OVER REACHING AND MISCONDUCT."

{¶ 114} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS 2004 STATEMENTS."

{¶ 115} "WHEN VIEWED CUMULATIVELY, THE OTHERWISE HARMLESS ERRORS COMMITTED BELOW DEPRIVED APPELLANT OF DUE PROCESS OF LAW AND A FAIR TRIAL."

{¶ 116} Appellant, in his first assignment of error, argues that the 24 year delay between the commission of the offense and the bringing of the indictment in this case resulted in substantial actual prejudice to appellant and was unjustified by the state, thereby depriving appellant of his right to due process.

{¶ 117} Appellee, noting that appellant has raised this argument for the first time on appeal,

states that because appellant did not raise the argument at the trial court, the issue has been waived and is not properly before this court. Although "[a]n appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court," *State v. Williams* (1977), 51 Ohio St.2d 112, 117, we find that appellant's argument should be afforded our full review on appeal, not just because it raises a fundamental constitutional issue, but also because the issue raised forms the basis for appellant's claim of ineffective assistance of counsel.

{¶ 118} Turning to the merits of appellant's argument, we note that an unjustifiable preindictment delay that results in actual prejudice to a defendant "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' * * * and which define 'the community's sense of fair play and decency' * * *", and, thus, effectively deprives a defendant of his right to due process of law under Section 16, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. *State v. Luck* (1984), 15 Ohio St.3d 150,

159, paragraph two of the syllabus; *United States v. Lovasco* (1977), 431 U.S. 783, 790 (citations omitted); see, also, *State v. Lewis*, 4th Dist. No. 00CA10, 2001-Ohio-2496.

{¶ 119} To determine whether an indictment should be dismissed as a result of a preindictment delay, the Supreme Court of Ohio, in *State v. Luck*, supra, adopted a test first used by the United State Supreme Court in *United States v. Lovasco*, supra, and *United States v. Marion* (1971), 404 U.S. 307. That test, as set forth in Luck, supra, is as follows:

{¶ 120} The defendant must first demonstrate that the delay caused actual prejudice to his defense. Id., at 157-158. Once the defendant makes this showing of actual prejudice, the burden then shifts to the state to prove that the reasons for the delay were justifiable. Id., at 158. The court then views the prejudice suffered by the defendant in light of the state's reason for the delay in order to make a determination as to whether the delay resulted in a violation of the defendant's due process rights. Id., at 154.

{¶ 121} To prove actual prejudice, a defendant must show, by concrete proof, the exculpatory value of any alleged missing evidence. See, *State v. Gulley* (Dec. 20, 1999), 12th Dist. No. CA99-02-004, citing

*United States v. Doerr* (C.A.7, 1989),886 F.2d 944, 964; *State v. Lewis*, supra, citing *State v. Flickinger* (Jan 19, 1999), 4th Dist. No. 98CA09; see, also, *State v. Brown*, (Mar. 17, 2000), 4th Dist. No. 98CA25, citing *United States v. Marion*, supra. In other words, a defendant must show how lost witnesses and physical evidence would have proven the defendant's asserted defense. See *State v. Gulley*, supra; *State v. Davis*, 7th Dist. No. 05 MA 235, 2007-Ohio-7216, ¶ 17 ("Without proof of prejudice, meaning something which adversely affects [a defendant's] ability to defend himself at trial, there is no due process violation for preindictment delay in prosecution."). A showing based on mere speculation will not be found sufficient. See *State v. Gulley*, supra; *State v. Brown*, supra. In addition, "[p]rejudice will not be found due to the lack of non-exculpatory evidence." *State v. Gulley*, supra.[17]

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[17]Missing evidence that does not necessarily exculpate a defendant and, therefore, cannot support a finding of actual prejudice, may still be used to attack the credibility of the state's evidence. *State v. Gulley*, supra. In addition, issues concerning why evidence is missing and what the evidence would have shown may well be relevant to trial. Id.

{¶ 122} The court, in deciding whether the prejudice that is established by a defendant constitutes "actual prejudice," must balance the claimed prejudice against the remaining evidence in the case, including any newly discovered evidence, to determine whether the missing evidence would have minimized or eliminated the impact of the state's evidence. See *State v. Luck*, 15 Ohio St.3d. at 154, 157; see, also, *State v. Brown*, supra. Ultimately, the determination of whether there has been "actual prejudice" involves" a delicate judgment based on the circumstances of each case." *United States v. Marion* (1971), 404 U.S. at 325; *State v. McClutchen*, 8th Dist. No. 81821, 2003-0hio- 4802, ¶ 11.

{¶ 123} If the defendant fails to meet his burden of establishing actual prejudice -- that is, if the court determines that the missing evidence would not have significantly minimized or eliminated the impact of the state's evidence -- the inquiry ends and the matter is concluded. If, however, the defendant meets his burden of establishing actual prejudice, the court must go on to determine whether there was any justifiable reason for the delay in prosecution that caused the prejudice. *State v. Luck*, 15 Ohio St.3d. at 158.

{¶ 124} According to the court in *Luck*, "[A] delay in the commencement of prosecution can be found to be unjustifiable when the state's reason for the delay is to intentionally gain a tactical advantage over the defendant * * * or when the state, through negligence or error in judgment, effectively ceases the active investigation of a case, but later decides to commence prosecution upon the same evidence that was available to it at the time that its active investigation was ceased." Id. The court additionally noted that "[t]he length of delay will normally be the key factor in determining whether a delay caused by negligence or error in judgment is justifiable." Id.

{¶ 125} If the court, upon viewing the prejudice suffered by the defendant in light of the state's reason for the preindictment delay, finds that the delay was unjustifiable and has resulted in actual prejudice to the defendant, such that he has been deprived of his due process rights, the indictment against the defendant will be dismissed. See *Luck*, supra. In making this determination, a court should bear in mind "some prejudice" to a defendant occurring from evidence lost over the years does not deprive him of due process; rather, in order for a defendant to be deprived of due process, the prejudice must be substantial. See *State v. Walls*, 96 Ohio St.3d

437, 2002-Ohio-5059, ¶ 56; *Lovasco*, 431 U.S. at 796 ("To prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.")

{¶ 126} In the instant case, appellant claims that he was prejudiced as a result of the death of several "key" defense witnesses. To establish a claim of prejudice due to the unavailability of witnesses who would be able to testify on a defendant's behalf, the defendant must identify the missing witnesses and the subject matter of their testimony, and, further, must explain how the missing evidence has impaired his defense. See *State v. McClutchen,* supra, at ¶ 13.

{¶ 127} Among the witnesses whose passing appellant claims to have been prejudiced by were Dr. Renate Fazekas and Dr. Steven Fazekas. Dr. Renate Fazekas performed the initial autopsy of Sister Pahl, and authored the attendant autopsy report. Dr. Steven Fazekas, who was Renate Fazekas' husband, attended the autopsy, but had no other involvement in the investigation.

{¶ 128} Appellant's claim that the death of Steven Fazekas somehow prejudiced his defense clearly amounts to nothing more than mere

speculation, and merits no additional consideration in this analysis. We note that "[t]he death of a witness alone is insufficient to establish actual prejudice arising from pre-indictment delay." *State v. Peoples*, 10th Dist. No. 02AP-945, 2003-Ohio-4680, ¶ 30.

{¶ 129} Regarding Dr. Renate Fazekas (hereinafter "Dr. Fazekas"), it is appellant's contention that her unavailability to testify as a defense witness at trial prevented appellant from developing defense theories that: (1) appellant could not have strangled Sister Pahl because, allegedly according to Dr. Fazekas, the murderer had "large hands" and appellant does not; and (2) the murder weapon, instead of being appellant's letter opener, was likely a pair of scissors that was discovered missing from the sacristy on the day of the murder.

{¶ 130} The state contends that appellant's ability to advance the above-stated theories was not in the least impeded by the unavailability of Dr. Fazekas, because Dr. Fazekas' autopsy report and all police reports relating to appellant's theories were introduced into evidence and used by the defense to advance its claim that appellant was innocent. The state further contends that "the reality of what Dr.

Fazekas expressed corroborates the State's evidence and not the defense's theory."

{¶ 131} In support of his position that the murderer had "large hands," appellant introduced a police report, from the day of the murder, of a brief interview of Dr. Fazekas by Det. Marx. According to the report, Dr. Fazekas was of the opinion that Sister Pahl was

{¶ 132} " * * * strangled from behind by an individual with large hands. This was the doctor's opinion due to the fact that a rather large bruise was noticed on the back neck. The doctor did state that the cause of death could not be determined until after complete autopsy. An autopsy would be scheduled for the following morning."

{¶ 133} As indicated above, Dr. Fazekas' report of Sister Pahl's autopsy made no mention of manual strangulation or of "large hands."

{¶ 134} Dr. Scala-Barnett, who conducted the second autopsy of Sister Pahl, was of the opinion that Sister Pahl was the victim of ligature, rather than manual, strangulation. Contrary to appellant's claim, Dr. Scala-Barnett did not "impeach" any autopsy findings of Dr. Fazekas, because Dr. Fazekas made no official finding of manual strangulation. As noted above, Dr. Fazekas stated after she had performed

the autopsy that the murder could have been committed by either a man or a woman. Thus, Dr. Fazekas' testimony would not necessarily have exculpated appellant.

{¶ 135} In considering appellant's argument that the murderer used a pair of scissors, rather than appellant's letter opener, we recall that in 1980, after the scissors were reported missing from the sacristy, Sister Mary provided police with a sample pair of scissors that were similar to the missing pair. Police then showed the sample pair of scissors to Dr. Fazekas to get her opinion as to whether scissors could have been the murder weapon. The "missing" scissors were never recovered and the sample scissors were only intended to be a reasonable approximation of what the "missing" pair might have looked like. The sample scissors were not retained by police, but a tracing of them was made and, at the request of the defense, was later introduced into evidence at trial. Sister Mary indicated to police that the "missing" scissors were about one inch longer and slightly wider than the sample.

{¶ 136} The shorter and slightly narrower scissors were inspected by Dr. Fazekas a couple of weeks after the murder. According to the police report, Dr. Fazekas, based upon her examination of

skin samples and photographs of Sister Pahl, felt that the sample scissors "could very well have been the weapon, but would not say it with 100 percent certainty." She also stated that some of the punctures on the body appeared to have been made with the scissors closed and some with the scissors open, and that the neck wounds appeared to have been made with the scissors open. She additionally stated that the wounds of the victim's face appeared to have been made with a weapon that was sharper than the scissors.

{¶ 137} Several days after she examined the sample pair of scissors, Dr. Fazekas examined appellant's letter opener. According to the police report, "Dr. Fazekas measured the instrument and compared the instrument as to depth of wound and to width of blade. Her conclusion was that the instrument was compatible with each of the wounds found in the body and could have been the weapon used."

{¶ 138} In support of his position that a pair of scissors was the murder weapon, appellant points to various measurements that Dr. Fazekas had taken of Sister Pahl's wounds. According to appellant, the measurements coincided more closely with the

dimensions of the missing scissors than with appellant's letter opener.

{¶ 139} In response to this argument, the state points out that, in fact, the wound measurements are not completely consistent with the dimensions of either the letter opener or the sample scissors (again, the actual "missing scissors" were never recovered), and that this phenomenon was explained by Dr. Scala-Barnett as resulting from lines of cleavage on the skin, which can affect the apparent width and depth of wounds on a body, depending upon how the line of cleavage is penetrated by a stab wound.

{¶ 140} As before, appellant's suggestion that Dr. Scala-Barnett somehow "impeached" Dr. Fazekas' autopsy findings is inaccurate, because Dr. Fazekas made no official finding that a pair of scissors was the murder weapon.

{¶ 141} To the extent that appellant claims that he was unfairly and substantially prejudiced because he was unable to cross-examine Dr. Fazekas in connection with various "inculpatory" statements -- including that there appeared to have been no rape; that the perpetrator may have been trying to mislead investigators into thinking there had been a rape; and that appellant's souvenir sword could have been the weapon used -- we note that appellant himself

argued in favor of the admission of old police reports that contained these statements. Any confrontation rights relating to the admission of these reports was knowingly, intelligently, and voluntarily waived by appellant at trial. See footnote 1, supra. Moreover, under the circumstances of this case, where Dr. Fazekas' "inculpatory" statements were corroborated by abundant other evidence, we conclude that the benefit to appellant of any cross-examination of Dr. Fazekas with respect to these statements is speculative, at best.

{¶ 142} In light of the foregoing, we find that appellant did not establish, by concrete proof, the exculpatory value that testimony by Dr. Renate Fazekas or Dr. Steven Fazekas would have had. See, *State v. Gulley*, supra; *State v. Lewis*, supra.

{¶ 143} Next, appellant complains that he was prejudiced because police reports that summarized oral statements he had made to police during his 1980 interviews were lost. First, appellant suggests that incriminating statements alleged to have been made by him in 1980 might not be in the reports, in which case the testimony of detectives would be impeached. However, the only truly incriminating statements made by appellant in 1980 consisted of his claim that had received a confession to the

murder from someone, followed by his denial that such a confession had occurred. Contrary to appellant's suggestion, these statements were, in fact, memorialized and did survive in a polygraph examination request form that had been filled out by Det. Marx in 1980. In addition, in 2004, appellant himself confirmed that he made those statements.

{¶ 144} Appellant claims that, in addition to the statements concerning the alleged confession, statements concerning appellant's alibi were likewise incriminating. At trial, Lt. Weigand testified that appellant had stated to him in 1980 that at the time he received the news of Sister Pahl's death, he was just finishing getting dressed. In 2004, however, appellant told police that when he received the news of Sister Pahl's death, he was dripping wet from his morning shower.[18] Appellant also considered

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[18] Although appellant correctly points out that the state argued to the jury that the discrepancy in the two stories was proof that appellant had lied to authorities about what he was doing at the time he learned of Sister Pahl's death, we find that the jury could just as well have concluded that the discrepancy was of no material significance whatsoever, or even that it came as a result of Lt. Weigand's faded 24 year-old memory.

incriminating Lt. Weigand's recollection at trial that, in 1980, appellant had stated that Sister Pahl had a "dominating personality."[19] Regarding these so-called incriminating statements, we find appellant has not shown, other than by speculation, that the missing notes are exculpatory. Instead, appellant seeks the missing notes to attack the credibility of police witness accounts. As indicated above, "[p]rejudice will not be found due to the lack of non-exculpatory evidence." *State v. Gulley*, supra.

{¶ 145} Appellant additionally alleges that he might have made exculpatory statements in 1980 which, in the absence of the police reports, he was unable to bring out at trial, thereby depriving him of: (1) any opportunity to demonstrate to the jury that the version of the events that he gave to police in 1980 was consistent with the version he gave in his 2004 videotaped statements; and (2) the ability to effectively cross-examine the police witnesses who had conducted the interviews. Regarding the alleged

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[19] Again, whether this is truly an incriminating statement is properly a matter of debate, especially in light of testimony by other witnesses who had variously described the victim as a "perfectionist," as one who could be "very, very strict," "very stern," and as one who would not hesitate to state her opinions.

inability to cross-examine police witnesses, in particular, appellant complained that "the investigators could only remember the incriminating details."

{¶ 146} The state, in response to this argument, points out that the detectives who interviewed appellant in 1980 freely conceded that he denied the murder. Appellant fails to suggest in any way what additional exculpatory statements he might have made or how they would be admissible. In response to appellant's complaint that the investigators could only remember the incriminating details of their interviews with appellant, we once again note that "[p]rejudice will not be found due to the lack of non-exculpatory evidence." *State v. Gulley*, supra.

{¶ 147} Finally, appellant argues that appellant's lost statements were critical to his trial preparation, in particular to his decision as to whether he should take the stand in his own defense. Specifically, appellant complains:

{¶ 148} "Appellant's original statements to police occurred in 1980 and they were lost. Twenty-four years later, during trial, the State used those uncorroborated oral statements against him. "

{¶ 149} However, appellant makes no suggestion that prior knowledge of the so-called uncorroborated oral statements would have changed his decision not to take the stand.

{¶ 150} Based on all of the foregoing, we find that appellant did not establish, by concrete proof, the exculpatory value of the missing 1980 police reports. See, *State v. Gulley*, supra; *State v. Lewis*, supra.

{¶ 151} Next, we consider the impact that the death of Father Swiatecki and the loss of his 1980 statements had on this case. Appellant argues that he was prejudiced by these occurrences for two reasons. First, appellant claims that there was evidence pointing to the fact that Swiatecki, rather than appellant, committed the murder. Specifically, appellant claims that, as a Catholic priest, Swiatecki fit the state's profile of the murderer and, as a big man, he fit Dr. Fazekas' initial impression that the victim had been strangled by someone with "large hands." Also, appellant claims that because it was Swiatecki who was the conducted the April 4, 1980 Good Friday services, it was he with whom the victim was angry, thereby providing him with a motive to kill.

{¶ 152} Second, appellant claims that Swiatecki's death and the loss of his 1980 statements prevented appellant's lawyers from questioning Swiatecki on his alibi between 7:30 a.m. and 7:50 a.m. on April 5, 1980.

{¶ 153} As indicated in the facts above, Dr. Fazekas' initial impression about the assailant having had "large hands" was followed by her impression that the murder could have been committed by a man or a woman, and by Dr. Scala-Barnett's opinion that the strangulation was a ligature, not manual strangulation.

{¶ 154} Regarding the issue of which of the two hospital priests had upset Sister Pahl on the day before her death, we note that although it is true that Swiatecki was the celebrant at the April 4, 1980 Good Friday services, the jury may just as well have concluded, based on the evidence that was presented, that appellant, as the Senior Chaplain at the hospital, was the one who planned the changes to the Easter services.

{¶ 155} More important, perhaps, is that Father Swiatecki was eliminated as a potential suspect early on in the investigation because several nuns had confirmed his presence in the cafeteria at the time of the murder. In response to this fact,

appellant states that there is evidence in the record indicating that the time frame during which the murder occurred is longer than the state suggests and could have extended beyond 7:30 a.m., thereby leaving the possibility that Swiatecki did not have an alibi during the crucial time. In support of this allegation, appellant points to a police report memorializing an interview of witness Margaret Warren -- who, as indicated above, was also deceased at the time of trial -- wherein she stated that she heard "frantic footsteps" "leading away from the crime scene at 7:50 a.m." In fact, that report indicates that Warren heard footsteps at 8:50 a.m., and that she heard the footsteps, not just leading away from the chapel, but also leading up to the area of appellant's room. As mentioned earlier, an inconsistency between the time that was recorded on Warren's time card and the time that was recorded in the police report as the time that Warren got to work on April 5, 1980, created ambiguity as to when, in fact, Warren heard the footsteps. See, footnote 4. From that ambiguity, the jury was free to conclude, as appellant suggests, that Warren heard the footsteps at 7:50.

{¶ 156} Even assuming, *arguendo*, that Warren, had she been available to testify at trial,

would have testified that she heard someone fleeing the crime scene at 7:50 a.m., rather than 8:50 a.m., and thus, as appellant states, "left open the possibility that Father Swiatecki, rather than appellant, was the murderer," such would not have contradicted the testimony of Wardell Langston, who said he heard the footsteps at approximately 7:30 a.m., and testimony by Sister Gordon, who stated that she had seen Father Swiatecki in the cafeteria at approximately 7:30 a.m. and that she had gone to the hospital chapel immediately after, where she remained until after 8:00 a.m., when she discovered Sister Pahl's body. In addition, any testimony by Warren that she heard footsteps at 7:50 a.m. would not necessarily have exculpated appellant. For these reasons, we find that any prejudice to appellant that was caused by Warren's death was speculative, at best, and therefore insufficient to establish actual prejudice. See *State v. Gulley*, supra; *State v. Brown*, supra.

{¶ 157} In the instant case, the evidence tended to show not that Swiatecki was guilty or that he was motivated by a desire to hide his own involvement in the murder -- as is suggested by appellant -- but rather that Swiatecki believed that appellant was guilty. Appellant, in his 2004 interview with police,

himself admitted that Father Swiatecki, while kneeling before the victim's body, accused appellant of killing Sister Pahl. There was no evidence to suggest that this information was supplied to the police back in 1980 or that Father Swiatecki sought to implicate appellant to authorities in any way, let alone that Swiatecki was motivated by a desire to hide his own involvement. Because the evidence indicated that Swiatecki believed that appellant was guilty, Swiatecki's testimony explaining his reasons for this belief would have been helpful to the prosecution, not the appellant.

{¶ 158} In arguing that Father Swiatecki's unavailability at trial prevented the defense from calling him to develop the theory that Father Swiatecki, not the appellant, was the true murderer, appellant does nothing more than speculate as to how the testimony of Father Swiatecki would have been helpful to his defense. Similarly, he fails to indicate how the police report of Father Swiatecki's 1980 interview would have been in any way exculpatory. Accordingly, we find that appellant did not establish, by concrete proof, the exculpatory value that testimony by Father Swiatecki would have had; nor did he establish the exculpatory value of the missing

report of Father Swiatecki's 1980 police interview. See *State v. Gulley*, supra; *State v. Lewis*, supra.

{¶ 159} Appellant raises in his initial brief, but appears to abandon in his reply brief, an argument concerning "at least" two deceased -- and unnamed -- witnesses who allegedly saw a "suspicious black male in close proximity to the crime scene, at or about the time of death, and right where one of the bloody altar cloths was found." As pointed out by the state, the only testimony at trial about anyone other than appellant being seen alone on the same floor as the chapel came from Sister Gordon who related seeing a person of very small stature (i.e., no "large hands") in a corridor near the planning office at some time between 7:05 and 7:10 a.m. on the morning of the murder. The man was in a hurry, and Sister Gordon thought he was late for work. She did not recall her statement to police in 1980, but she did not think that this individual was black. Moreover, this person was not seen "in close proximity to the crime scene * * * and right where one of the bloody altar cloths was found", but, in fact, was spotted at the opposite end of the main hallway leading from the chapel doors and around another hallway by a room known as the planning office. On the basis of the foregoing, we find that appellant's claims about deceased witnesses who

allegedly saw a suspicious black man in close proximity to the chapel are unsupported by the evidence and are completely speculative. Accordingly, they will be given no additional consideration by this court.

{¶ 160} Finally, appellant claims that that he was prejudiced by the fact that the state lost the sample pair of scissors that was examined by Dr. Fazekas in this case. As emphasized above, the "missing" scissors were never recovered and the sample scissors were only meant to be a reasonable approximation of what the "missing pair" would have looked like. Also, although the sample scissors themselves were not retained, a tracing of them was made, introduced into evidence, and shown to the jury. Appellant argues that without the sample scissors, he was unable to present expert testimony to corroborate Dr. Fazekas' initial finding that a pair of scissors could have been the murder weapon. Inasmuch as the sample scissors were just that, sample scissors, and not the actual scissors discovered missing from the sacristy, we find that appellant has failed to show, by concrete proof, the exculpatory value of the missing evidence. *State v. Gulley*, supra; *State v. Lewis*, supra.

{¶ 161} In determining whether appellant has sustained his burden to demonstrate "actual prejudice," it is necessary to consider the strength of the state's case, because a compelling case will require a higher level of prejudice to warrant dismissal of the indictment. See *Luck*, supra, at 154, 157; *Brown*, supra. As indicated infra, in our analysis of appellant's fourth assignment of error concerning the weight of the evidence in this case, the evidence of appellant's guilt -- including evidence showing that he was the person who committed the murder and that the instrument that he used to commit the murder was his sword-shaped letter opener -- was very strong. And, in light of that evidence, we are compelled to conclude that any small amount of prejudice that may arguably have been suffered by appellant as the result of the missing evidence (and based upon our analysis above, we do not find that there was any such prejudice) did not constitute "actual prejudice." In this case, the lost witnesses and physical evidence would not have proved appellant's asserted defenses, and the missing evidence would not necessarily have exculpated appellant. Instead, the missing evidence went to the credibility of the state's evidence, which was a matter best left for trial. See *State v. Gulley*, supra.

{¶ 162} Because appellant has failed to meet his burden of establishing actual prejudice, we need not consider whether there was any justifiable reason for the delay in the prosecution in this case. In addition, because the issue of pre indictment delay was not raised in the trial court, the state never had an opportunity to present evidence on the subject. For these reasons, we decline to examine the merits of this aspect of appellant's claim. And for all of the foregoing reasons, appellant's first assignment of error is found not well-taken.

{¶ 163} Appellant argues in his second assignment of error that he was denied effective assistance of counsel because his trial counsel failed to file a motion to dismiss the indictment based upon the 24-year-long preindictment delay.

{¶ 164} In order for a defendant to obtain a reversal of a conviction or sentence based on ineffective assistance of counsel, he must prove "(a) deficient performance ('errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment') and (b) prejudice ('errors * * * so serious as to deprive the defendant of a fair trial, a trial whose result is reliable')." *State v. Adams*, 103 Ohio St.3d 508,

2004-Ohio-5845, ¶ 30, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687.

{¶ 165} In evaluating appellant's claim of ineffective assistance of counsel, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id., at ¶ 31, citing *Strickland*, supra, at 689. In addition, we are mindful that "[t]rial counsel cannot be second-guessed as to trial strategy decisions." Id.

{¶ 166} Appellant's trial counsel strategy appears to have hinged on the notion that evidence that was missing in the case resulted primarily in an evidentiary problem, rather than a due process problem. Evidence of this strategy can be found in trial counsels' pretrial attempts to compel the production of missing evidence relating to appellant's 1980 police interviews, and in trial counsels' argument at trial wherein they sought to have admitted into evidence as "ancient documents" various other police reports from 1980.

{¶ 167} On appeal, appellant objects to his trial counsels' strategy, stating that the focus of the strategy should have been not on the evidentiary problem raised by the missing evidence, but rather on the due process problem arising from the 24-year-long preindictment delay.

{¶ 168} We find that under the circumstances of this case, trial counsels' performance was skillful, and their strategy, sound. We reach this conclusion, in part, because, without the admission of statements contained in the old police reports, appellant would have had virtually no evidence with which to counter the state's evidence. With those statements, however -- in particular, those by Dr. Fazekas concerning an assailant with "large hands" and the possibility that a pair of scissors had been the murder weapon -- appellant had at least some basis upon which to argue his alternative theories respecting the killer's identity and the identity of the weapon that was used.

{¶ 169} Moreover, as we indicated in our discussion of appellant's first assignment of error, appellant did not suffer actual prejudice as a result of the pre indictment delay, and, therefore, any pretrial motion to dismiss the indictment based on that delay would properly have been denied by the trial court. The law is well-settled that "[c]ounsel is not required to file a meritless motion simply for the sake of placing it on the record to avoid a charge of ineffective counsel." *State v. Davenport* (Oct. 25, 2000), 9th Dist. Nos. 19419, 19420.

{¶ 170} On the basis of the foregoing, we find that trial counsel's failure to file a motion to dismiss the indictment based in the 24-year-long preindictment delay did not constitute error. We further find that it did not result in prejudice to appellant.

{¶ 171} "To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989),42 Ohio St.3d 136, paragraph three of the syllabus.

{¶ 172} Although the introduction of the old police reports may arguably have had the unwanted effect of emphasizing the lack of actual prejudice suffered by appellant due to the preindictment delay, there is no evidence or allegation to suggest that the introduction of the reports did anything to change the outcome in this case. Stated otherwise, we find that even without the information contained in the old police reports, appellant's claims of actual prejudice are no less unsupported than they were with the information; as such, those claims remain insufficient to establish a due process violation.

{¶ 173} As appellant has failed to establish either error on the part of his counsel or prejudice arising from his counsels' performance, appellant's second assignment of error is found not well-taken.

{¶ 174} Appellant argues in his third assignment of error that the state violated appellant's right to a fair trial by injecting "Satanism" into the criminal process, through the testimony by Father Grob. Upon our review of Father Grob's testimony, we find that, contrary to appellant's claim, the focus of that testimony was not on "Satanism," but rather on efforts that were made by the killer to degrade and humiliate the victim.

{¶ 175} Prior to trial, Father Grob was subpoenaed to testify at a hearing held in February 2006. The purpose of the hearing was to have the court determine the qualifications of various experts that the prosecution intended to call and the admissibility of the experts' testimony. At the last moment, appellant did not want to have a hearing concerning the admissibility of Father Grob's testimony. Instead, the parties entered into a written agreement wherein it was specified that if the state laid the proper factual foundation, Father Grob could testify as to the following: (1) his opinion that the perpetrator had a high level of knowledge of the

Catholic religion; (2) his opinion that the facts and circumstances of the homicide indicated a conscious design by the perpetrator to mock or degrade the Catholic religion; (3) his opinion that the facts of the case indicated that some type of ritual or ceremony was conducted over the victim's body; and (4) his opinion that appellant risked disciplinary action by the Catholic Church, up to and including excommunication, by his comments to Det. Marx about the alleged confession.

{¶ 176} At trial, Father Grob was called and questioned regarding his credentials to testify as an expert witness. Pursuant to Evid.R. 702, a witness who is qualified as an expert by specialized knowledge, skill, experience, training, or education may testify as to matters beyond the knowledge and experience possessed by lay persons. Father Grob was qualified and accepted by the court as an expert in the fields of Catholicism and rituals. The subject matter of his testimony clearly related to matters beyond the understanding and experience of most jurors.

{¶ 177} At trial, Father Grob explained the Catholic rituals concerning Easter. He referred to the three days preceding Easter Sunday as the Paschal Triduum. On Holy Thursday, the first day of the

triduum, the focus of the evening service is on the Last Supper, the meal at which Catholics believe that Christ created the Eucharist by blessing bread and wine and turning them into his body and blood. Father Grob explained that the Eucharist, also referred to as the consecrated Host, Holy Communion, or the Blessed Sacrament, is central to the Catholic religion. At the end of the Holy Thursday service, the Eucharist is removed from the tabernacle on the altar of the church or chapel and placed in a repository in the sacristy.

{¶ 178} On Good Friday, the focus of the service is on Christ's crucifixion and veneration of the cross. At the end of the service, the altar is stripped bare as a means of emphasizing Christ's death on the cross. On Holy Saturday, there is only an evening service.

{¶ 179} Applying this information to the data relating to the crime scene at Mercy Hospital, Father Grob found that it was significant that the murderer chose the sacristy rather than the chapel as the site of the murder because that was the place where the Eucharist had been kept since the Holy Thursday service. He indicated that Sister Pahl was a nun, and, as such, a bride of Christ. He viewed the fact that she had been stripped naked from her shoulders

to her feet, the fact that her forehead had been marked with blood, the manner in which she had been posed, and the fact that she had been covered with an altar cloth and stabbed through it nine times in the shape of an inverted cross as indicators that this was a ritualized murder in which the perpetrator sought to mock and degrade Sister Pahl, God, and the Catholic Church. And, based on his experience and training, he believed that the murderer had to have specialized knowledge of Catholic rituals for the crime to have been committed in the manner it was.

{¶ 180} Appellant argues that Father Grob's testimony amounted to prejudicial "profiling" testimony. We disagree. In the instant case, Father Grob was not requested to engage in criminal "profiling," nor did he attempt to do so. Criminal profiling is the attempt to link the general characteristics of a unique kind of crime, such as a serial murder, to the specific characteristics of the defendant. *Simmons v. State* (Ala.Crim.App. 1999), 797 So.2d 1134, 1150. "Such evidence is of little probative value and [is] extremely prejudicial to the defendant since he is, in a sense, being accused by a witness who was not present at any of the crimes." Id.

{¶ 181} Father Grob's testimony, on the other hand, centered on his opinion of what the crime scene and the physical condition of the victim's body suggested happened during the murder -- not unlike the testimony of an expert in the field accident reconstruction. See id., at 1151. There is an enormous difference between testimony identifying a person who bears certain characteristics as being more likely to have committed an offense and testimony indicating that the physical evidence of a crime reveals certain characteristics about the offense. See id. Father Grob's testimony had nothing to do with "profiling" within the meaning of the term as used by appellant. This crime involved a Catholic nun who was killed in the sacristy of a Catholic chapel in a Catholic hospital on Holy Saturday. The murderer clearly performed some kind of rituals as part of the slaying, and that was all that father Grob testified about.

{¶ 182} Father Grob used the term "Satanic" only four times during his entire examination. His first use of the term was nothing more than a harmless reference to his duties as an assistant to the exorcist for the diocese of Chicago.

{¶ 183} The second use occurred when he was explaining his doctoral thesis on exorcism. There he stated:

{¶ 184} "[A] person can't write on the rite or the ritual of exorcism, be it the ancient or the revised, without having to study a whole background of practices of things that people do. Again, you fall into the realm of Satanism, satanic worship, you can go into Tarot cards, you can go into horoscopes, you can go into any number of things, but anything that is not focused on the divine, on God, other gods with a small G and quotation marks, it would be an area of study."

{¶ 185} Again, the use of the term was wholly innocuous within this context.

{¶ 186} The third use of the term occurred when Father Grob was discussing the degrading manner in which Sister Pahl's body had been displayed in the sacristy. He was discussing the term "mockery reversal," and he merely pointed out that such conduct frequently occurs in "* * * any kind of ritual abuse, particularly satanic ritual abuse."

{¶ 187} His final use of the term occurred when he was discussing the significance of an inverted or upside down cross. Father Grob explained that an inverted cross was first associated with the death of

St. Peter. Father Grob went on to explain that "* * * [u]nfortunately, for many centuries now, that image has been usurped and is used in satanic worship as an effrontery, again, to the sacred."

{¶ 188} Although it is appellant's contention that the state sought to stereotype him as an Antichrist and to establish that there was a satanic motivation in Sister Pahl's murder, the record clearly demonstrates that Father Grob never testified that Sister Pahl's murder was "satanic". He never described appellant as a "Satanist". When asked to explain what he believed the photographs and descriptions of the crime scene meant to him as a priest, he expressed his opinion primarily in terms of the murder being a mockery of Sister Pahl's life of devotion to Christ.

{¶ 189} The state's theory of the case was not, as appellant claims, that there was a satanic motive for the homicide. The assistant prosecutors never used such a term until closing argument, when the state specifically argued that what occurred was clearly not satanic. Father Grob's testimony was not offered in an attempt to prove the motivation for the murder. The testimony was offered to explain certain unusual circumstances which surrounded the crime scene that were beyond the knowledge and

experience of the trier of fact. Appellant's third assignment of error is found not well-taken.

{¶ 190} Appellant argues in his fourth assignment of error that the jury's finding on the element of identity was contrary to the manifest weight of the evidence. This court has articulated the applicable standard of review as follows:

{¶ 191} "Our function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 1997-Ohio-52. Under this standard, this court sits as a "thirteenth juror" and reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses, and determines whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. Id., citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. If we decide that the fact finder clearly lost its way, we must reverse the conviction and order a new trial. Id.

{¶ 192} "Nevertheless, we will not reverse a conviction so long as the state presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v.*

*Getsy*, 84 Ohio St.3d 180, 193-194, 1998-Ohio-533. Moreover, we must keep in mind that the credibility of the witnesses who testified at trial is chiefly a matter to be determined by the trier of fact. *State v. McDermott*, 6th Dist. No. L-03-1110, 2005-Ohio-2095, ¶ 25, quoting *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus." *State v. Terry*, 6th Dist. No. L-06-1298, 2007-Ohio-4088,¶ 12-13.

{¶ 193} In the instant case, the state provided ample evidence at trial for the jury to conclude that appellant was the perpetrator of the homicide. That evidence was as follows. On April 5, 1980, at 8:15 a.m., Sister Gordon discovered the mutilated body of Sister Margaret Ann Pahl in the sacristy of the Mercy Hospital chapel. April 5, 1980 was Holy Saturday, the day before Easter.

{¶ 194} The victim was last seen alive at approximately 6:50 a.m. The hospital chapel was continuously occupied by Sister Gordon from approximately 7:30 a.m. until 8: 15 a.m., when she discovered Sister Pahl's body. Thus, the homicide occurred sometime after 6:50 a.m., but before approximately 7:30 a.m.

{¶ 195} Appellant has always maintained that, on the morning in question, he remained in his living quarters -- which were situated down the hallway

from the chapel -- until after Sister Pahl's body was discovered.

{¶ 196} Contradicting appellant's story was testimony by other hospital employees who stated that they had seen appellant directly outside the chapel doors, both shortly before and shortly after the time of the murder.

{¶ 197} Other evidence that pointed to appellant as the perpetrator was his uniquely-shaped letter opener and the fact that it left its "fingerprint" in the victim's blood on the altar cloth that covered the victim's body and, further, it perfectly fit her wounds.

{¶ 198} In addition, there was evidence that appellant lied to police, both in 1980 and 2004. In 1980, appellant told police that the "killer" had confessed to him. When pressed, however, appellant admitted to making the story up to protect himself.

{¶ 199} In 2004, appellant told police that he could not have gotten into the locked sacristy because he had no key to the door. Two nuns testified to the contrary, stating that appellant, as a priest, would have had his own key to the sacristy.

{¶ 200} Also in 2004, appellant repeatedly stated that after being informed of Sister Pahl's death, he quickly dressed from his morning shower

and then "ran" to the chapel. But when he was confronted with statements by witnesses who said they had heard the sounds of running footsteps in appellant's hallway on the morning of the murder prior to Sister Pahl's body being discovered, appellant changed his story to say that he could not have run, due to the length of his cassock.

{¶ 201} Finally, in 2004, appellant changed his initial story to police that he had kept his door unlocked, ultimately conceding that he had kept his apartment locked.

{¶ 202} The law is clear that lies told by an accused are admissible evidence of consciousness of guilt, and thus of guilt itself. *State v. Tressler*, 6th Dist. No. WM-02-005, 2003-Ohio-1418, ¶ 42, citing *State v. Eaton* (1969), 19 Ohio St.2d 145, 160, vacated on other grounds (1972), 408 U.S. 935.

{¶ 203} Also implicating appellant was his own statement to police that after Father Swiatecki had directly accused him of the murder, appellant offered no reply. This failure to deny Father Swiatecki's accusation could properly have been construed by the jury as an implicit admission of appellant's involvement in the homicide. See, *State v. Alexander* (Nov. 29, 1996), 11th Dist. No. 93-T-4948; *State v.*

*Hardison*, 9th Dist. No. 23050, 2007-Ohio-366, ¶ 9; see, also, Evid. R. 801 (D)(2)(b).

{¶ 204} Additional evidence that implicated appellant as the perpetrator was the statement by Wardell Langston that shortly after 7:30 a.m., he heard the loud footsteps of someone running on the floor above him, coming down the hallway from the bridge that connected to the chapel and then making his or her way around the balcony above him to another connecting hallway that led to appellant's residence. It was in this residence that appellant claimed to have been at the time of Sister Pahl's murder.

{¶ 205} Police had concluded that it was likely that the assailant and the victim were not strangers to one another. Testimony by Father Grob established that Sister Pahl's killer would have been someone with specialized knowledge of Catholic ritual, such as a religious sister, a seminarian, or a priest. It was Father Grob's opinion that much of what the assailant did to the victim was an attempt to mock and degrade her.

{¶ 206} At the time of the murder, everyone in the hospital who had relevant religious knowledge was accounted for, except for appellant.

{¶ 207} Testimony by various witnesses suggested that appellant may not have been happy working with the nuns at the hospital, and that Sister Pahl, in particular, was very strict, stern, dominant, and opinionated.

{¶ 208} Testimony by Shirley Lucas established that on the day before the murder, Sister Pahl had become very upset with one of the hospital priests after speaking to him about changes he wanted to make to Easter services. Lucas was unable to say which priest had upset the victim. Father Swiatecki was in the dining room at the time the murder occurred. Appellant, however, was seen at the chapel door -- not once, but twice -- within the time frame of the murder.

{¶ 209} Based on all of the foregoing, we find that there was abundant substantial evidence upon which the jury could conclude that appellant was the person who killed Sister Pahl. The record contains no indication that the jury "lost its way" or "created a manifest miscarriage of justice." See *State v. Terry*, supra. Accordingly, appellant's fourth assignment of error is found not well-taken.

{¶ 210} In his fifth assignment of error, appellant again argues that he was denied effective assistance of counsel. While his second assignment of

error dealt with the single matter of trial counsel's alleged ineffectiveness for failing to file a motion to dismiss the indictment, his fifth assignment of error recites a litany of other instances of alleged ineffectiveness.

{¶ 211} First, appellant complains that "13 days into the trial, his counsel agreed that Father Jeffrey Grob could properly stereotype him as the perpetrator of this crime." In this regard, appellant cites the written stipulation wherein the parties agreed that, conditioned upon an appropriate factual foundation, Father Grob could give certain expert and opinion testimony.[20] Appellant argues that, rather than entering into the stipulation, trial counsel should have filed a motion in limine to exclude Father Grob's testimony.

{¶ 212} In fact, appellant's defense team did file a motion in limine asking the trial court to prohibit testimony from Father Grob. As a result, a hearing was scheduled for February 16, 2006, to determine Father Grob's qualifications and the admissibility of his testimony as an expert. The

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[20]For details about the testimony that was agreed to, and our analysis concerning its admissibility at trial, see our discussion, supra, of appellant's third assignment of error.

hearing was ultimately determined to be unnecessary when, following an in-chambers discussion, the parties reached the aforementioned stipulation concerning Father Grob's testimony. That same day, counsel and appellant orally acknowledged their acceptance of the agreement on the record. The written stipulation was filed with the clerk of courts on April 28, 2006, several days before Father Grob testified. Thus, contrary to appellant's contention, the referenced stipulation, which was initially entered into on February 16, 2006, was not entered into "13 days into appellant's trial."

{¶ 213} On the face of the stipulation document is a notation stating that appellant was "advised by his attorneys as to the implications of the stipulation and agrees with his lawyers' counsel and advice that for trial strategy reasons the stipulation is in his best interest in terms of proceeding to the trial of the charges against him." As indicated above, the law is well settled that counsel's actions that might be considered trial strategy are presumed effective and should not be second-guessed by a reviewing court. *State v. Adams*, 103 Ohio St.3d. at ¶ 30. As the stipulation in this case was clearly a calculated trial tactic, we presume its effectiveness and, therefore, we

decline to give the matter any additional consideration.[21]

{¶ 214} By way of a footnote, appellant argues trial counsel should also have filed a motion in limine to exclude the testimony of the deputy coroner, Dr. Scala-Barnett. At trial, Dr. Scala-Barnett testified as follows regarding her qualifications. She stated that she had been a forensic pathologist employed as a deputy coroner with the Lucas County Coroner's Office since 1985. During that time she was also a clinical associate professor at the Medical College of Ohio/ Medical University of Ohio ("MUO"), teaching pathology and forensic pathology. Her education included four years of college, one year of graduate school, four years of medical school, four years of pathology training at MUO, and one year of fellowship training in forensic pathology at the Cook County Medical Examiner's Office in Chicago. At the time of her testimony, she had previously performed a total of approximately 6,800 autopsies. Those included approximately 501 homicide cases. Of those,

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[21]We note that, even if appellant had proceeded to a hearing, his motion in limine would have been denied. As we found in our discussion of appellant's third assignment of error, Father Grob's testimony was proper and admissible.

approximately 70 involved sharp force injuries and 35 involved strangulation. Dr. Scala-Barnett was board certified in pathology and forensic pathology and was licensed in two states, Ohio and Illinois. She was also a member of the American Academy of Forensic Sciences and the National Association of Medical Examiners.

{¶ 215} Dr. Scala-Barnett was clearly qualified to testify as an expert in this case. Thus, any motion in limine concerning her testimony would have been denied. As was noted above, "[c]ounsel is not required to file a meritless motion simply for the sake of placing it on the record to avoid a charge of ineffective counsel." *State v. Davenport*, supra.

{¶ 216} Appellant next suggests that trial counsel was ineffective for failing to request ajury instruction that, "* * *[in order] to find appellant guilty the jury had to exclude all inferences that might support a reasonable theory of innocence." Our review of the record reveals that -- contrary to appellant's claim -- trial counsel did, in fact, request such an instruction. The request was properly denied, however, because the proposed instruction does not correctly reflect Ohio law. In *State v. Jenks* (1992), 61 Ohio St.3d 259, the Ohio Supreme Court specifically held that, "* * * when the state relies on

circumstantial evidence to prove an element of the offense charged, there is no requirement that the evidence must be irreconcilable with any reasonable theory of innocence in order to support a conviction." Id., at 273. Based on the foregoing, we find that trial counsels' conduct with regard to the subject instruction was neither error nor prejudicial. See *State v. Adams*, supra, at ¶ 30; see also, *Strickland*, supra, at 687.

{¶ 217} Appellant next contends that trial counsel was ineffective for failing to request a jury instruction that a coroner's verdict is entitled to "presumptive evidentiary significance." In this regard, appellant suggests that the 1980 coroner's report contains "exculpatory facts" which the jury should have been instructed to presume were true. Appellant fails, however, to identify even a single fact that he considers "exculpatory".

{¶ 218} In considering appellant's argument, we note that the state actually moved for admission of the 1980 coroner's report as *inculpatory* evidence of appellant's guilt. The state explains the significance of the report from its point of view as follows.

{¶ 219} "The 1980 report was authored by former deputy coroner, Renata Fazekas. At trial, the 1980 report was referenced by deputy coroner

Scala-Barnett, who described Dr. Fazekas as her '* * * mentor and * * * teacher.' The 1980 report concluded that '[t]his 71-year-old white female, Sister Margaret Ann Pahl, died of multiple, 31, stab wounds to the left side of the face, neck, and the chest. There also was evidence of strangulation.' Dr. Scala-Barnett testified that she performed a second autopsy in 2004. Her report is entitled to the same presumption as that of Dr. Fazekas concerning the cause of death because she too is a deputy coroner. The procedure followed was very similar to the first autopsy, but she also collected DNA evidence in the piece of bone from the victim's jaw. She subsequently inserted the appellant's letter opener into the jawbone and found that it was 'a perfect fit'. Based upon her experience, knowledge and training, Dr. Scala-Barnett concluded '* * * that this weapon caused these injuries or a weapon exactly like this caused the injuries.' Her report did not conflict with or contradict the 1980 coroner's report but supplemented it. Together the two reports established overwhelming evidence of the appellant's guilt." (Citations to the record omitted.)

{¶ 220} Based upon the foregoing, we find that had trial counsel requested the subject jury instruction, it would have benefited the state of Ohio, and not appellant.

{¶ 221} Even assuming, *arguendo*, that the 1980 report might have included arguably exculpatory information, it was plainly rebutted by competent, credible evidence to the contrary, through the testimony of Dr. Scala-Barnett and the other forensic experts who testified in this case. *Vargo v. Travelers Ins. Co.* (1987),34 Ohio St.3d. 27, paragraph one of the syllabus (Holding that coroner's factual determinations regarding cause of decedent's death in coroner's report/death certificate create a "* * * non-binding, rebuttable presumption concerning such facts in the absence of competent, credible evidence to the contrary. "); see, also, *Whitfield v. Bartek*, 11th Dist. No. 2007 Ohio-0078, 2008-0hio-1026, ¶ 33. We therefore find that any error in defense counsel's failure to request the proposed jury instruction was harmless, and did not result in any prejudice to appellant. See *Adams*, supra, at¶ 30; *Strickland*, supra, at 687.

{¶ 222} Appellant next enumerates -- in a single paragraph, and with little or no substantive discussion -- six additional instances of alleged ineffective assistance. In the first, appellant complains that trial counsel failed to conduct effective cross-examination of the state's forensic witnesses. But, in making this complaint, appellant

fails to provide any substantive argument in support of his position. Rather, in a footnote, he complains about the number of transcript pages devoted to cross-examination of the state's experts.

{¶ 223} The argument that the effectiveness of cross-examination should be judged by the number of transcript pages that the cross-examination consumes is one that simply cannot succeed. As stated by the Supreme Court of Ohio in *State v. Dixon* (2004), 101 Ohio St.3d 328, 2004-0hio-1585, "The extent and scope of cross-examination clearly fall within the ambit of trial strategy, and debatable trial tactics do not constitute a lack of effective assistance of counsel." Id., at ¶ 54.

{¶ 224} Appellant next claims -- without any citation to authority or to the record - that his trial counsel erred by failing to file any motions regarding the propriety of the state's evidence. Our review of the record reveals that, contrary to appellant's contention, trial counsel sought to determine the admissibility of the testimony of several state witnesses by way of a "Motion in Limine and Request for *Daubert* Hearing." Among the witnesses whose testimony was challenged by this motion were Father Grob of the Chicago Archdiocese, criminalist T.

Paulette Sutton, and forensic anthropologist Steven Symes.

{¶ 225} Appellant next complains -- again, without citation to authority or to the record -- that his trial counsel demonstrated an inability to cite applicable law during key in-chambers and bench conferences. Contrary to this conclusory allegation, we find that the defense team demonstrated a sophisticated knowledge of the law, both constitutional and evidentiary. An example of this high level of knowledge was manifested in the team's success in arguing for application of the "ancient documents" exception to the hearsay rule in order to gain admission of old police reports into evidence.

{¶ 226} Next, appellant complains that the defense team called certain police officers to the stand in its case-in-chief. He claims that this was done for "no apparent tactical reason." To the contrary, the record reveals that the defense team called these witnesses for the purpose of impeaching key state witnesses and to attack the quality of the police work done in 1980.

{¶ 227} The defense elicited testimony from Det. Forrester to challenge the credibility of witnesses Jack Baron, Leslie Kerner, and Grace Jones, each of whom had observed appellant in the

vicinity of the chapel at the time of the murder. With this witness, the defense also challenged the adequacy of the 1980 police investigation.

{¶ 228} Appellant called Det. Daniel Foster to further challenge the credibility of Jack Baron.

{¶ 229} Through the testimony of Det. Weinbrecht, trial counsel challenged the credibility of Wardell Langston concerning the footsteps he reported hearing in the hallway leading to appellant's living quarters. Counsel also elicited testimony concerning a pair of scissors that counsel later argued was the murder weapon.

{¶ 230} Also through Det. Weinbrecht, appellant presented testimony suggesting that footsteps heard by Margaret Warren at the time of the murder were not those of appellant. In addition, counsel was able to attack the accuracy of various police reports. Finally, appellant was able to elicit testimony that appellant had been referred to as a "very meek and mild type of individual. "

{¶ 231} Investigator Ross was initially called by the state in its case-in-chief. The defense recalled him in its case to elicit additional testimony supporting its argument that the footsteps heard by Margaret Warren were not appellant's. The defense also used Ross to lay an appropriate foundation for

the admission of the smock that was removed from Sister Paul's body on the day of her autopsy.

{¶ 232} Through Det. Marx, the defense attempted to impeach Leslie Kerner's trial testimony with a statement that she had provided to an investigator back in 1980. In the statement, Kerner had reported not having seen anything unusual on the day of the murder.

{¶ 233} Testimony by Det. Marx further established that in 1980, student nurse Connie Schroeder had reported to police that she had been near the chapel doors at around 7:00 a.m. on the day of the murder, and had observed at that time that the chapel doors were open. Such testimony arguably contradicted the trial testimony of witness Rose Byers, who testified that around 7:00 a.m. on the day in question, the chapel was locked.

{¶ 234} Defense counsel likewise established that Mercy Hospital nun Sister Mary Alacoque had reported to police in 1980 that at approximately 7:00 or 7:15 a.m. on the day in question, she had traveled on the elevator near the chapel corridor, walked to the nuns' dining room, and had seen no one.

{¶ 235} Through Det. Marx, defense counsel again challenged the sufficiency of the 1980 police investigation. Counsel elicited testimony which

permitted the argument that police failed to preserve or collect evidence at the murder scene; that there were missing technicians' reports; and that police failed to do a complete job of testing for fingerprint evidence. Also from Det. Marx, defense counsel educed testimony concerning missing police reports.

{¶ 236} These witnesses were essential to appellant's strategy to diminish the testimony of state witnesses and to attack the initial police work done on this case. With the exceptions of Det. Forrester and investigator Ross, the defense was forced to call all of these witnesses because the state did not use them in its case-in-chief. In closing argument, defense counsel actually used this fact to appellant's advantage, arguing that the state did not call Det. Marx" [b]ecause the investigation was so poor, and that's important in terms of evaluating this case." Trial counsel's decision to call these witnesses was a matter of sound trial strategy. See *State v. Adams*, supra, at ¶ 31.

{¶ 237} Next, appellant argues that trial counsel was ineffective for failing to renew a motion for judgment of acquittal at the close of the evidence. In evaluating this claim, we note that trial counsel did, in fact, make a motion for acquittal at the close of the state's case, and that it was denied by the trial

court. A motion for judgment of acquittal pursuant to Crim.R. 29 should be denied "if the evidence, viewed in the light most favorable to the government, is such that 'a reasonable mind might fairly find guilt beyond a reasonable doubt.'" *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 263; *State v. Catlett* (July 24, 1981), 6th Dist. No. L-80-312. In light of the overwhelming evidence of appellant's guilt, it must be concluded that appellant's motion for acquittal was properly denied. And if trial counsel had renewed the motion at the end of the defense's case, it likewise would have been properly denied. Accordingly, we find that appellant, in making this claim, has failed to establish a claim for ineffective assistance. See *State v. Adams*, 103 Ohio St.3d 508, supra, at ¶ 30; *Strickland*, supra, at 687; see, also, *State v. Davenport*, supra, (holding that" [c]ounsel is not required to file a meritless motion simply for the sake of placing it on the record to avoid a charge of ineffective assistance of counsel").

{¶ 238} Finally, appellant claims the trial counsel did not appreciate the exculpatory nature of "crucial physical and forensic evidence in this case." He describes the so-called "crucial evidence" in a footnote. In a conclusory fashion and without citation to the record, appellant asserts that the letter opener

measures "3/8 inches in width at 1 1/2 inches from its tip," and, that, based on this measurement, the letter opener is incompatible with Dr. Fazekas' finding as to the facial wounds. We do not find these measurements in the record. Even if they were in the record (and we make no finding that they are), appellant fails to identify how they would be inconsistent with any information contained in Dr. Fazekas' report.

{¶ 239} Appellant then claims that the letter opener blade varies in width "between 1 1/2 and 3 inches from its tip," and that, based on this measurement, the letter opener is incompatible with Dr. Fazekas' findings as to the characteristics of the murder weapon. Again, appellant fails to identify any specific inconsistency.

{¶ 240} Appellant asserts that defense counsel was ineffective for failing to make these arguments concerning the alleged incompatibilities to the jury.

{¶ 241} In a similar manner -- and, again, without citation to the record -- appellant asserts that "the sample scissors had blades that were 3 inches in length (compatible with the deepest stab wounds to the victim's neck and chest) and one-half (1/2) inch in width at that length (compatible with all of the deepest stab wounds to the victim's neck and

chest)." While appellate counsel presents these as matters of "fact," we do not find that they appear in the record.

{¶ 242} Although there apparently was a pair of scissors missing from the room in which the victim was murdered, the record is void as to the exact length the blades of those scissors. The only reference in the record is to a tracing of a pair of similar scissors that were both narrower and about an inch shorter than the pair of scissors that was thought to be missing.

{¶ 243} In spite of the foregoing, appellant argues that counsel was ineffective for failing to argue that the missing scissors were the murder weapon. In fact, much of the defense's closing argument was dedicated to the proposition that the murder weapon was a pair of scissors, and not the letter opener.

{¶ 244} Moreover, "it is well established that if demonstrating ineffective assistance of counsel requires proof outside the record, then such claim is not properly raised in a direct appeal." *State v. Baker*, 7th Dist. No. 03 CO 24, 2003-Ohio-7008, ¶ 16. Because appellant's argument concerning defense counsels' alleged failure "to appreciate the crucial physical and forensic evidence in this case" depends

upon proof outside the record, we find that it is not properly before us in this appeal and, therefore, warrants no additional consideration herein. See id.

{¶ 245} Even assuming the propriety of appellant's argument in this appeal, appellant's claim would necessarily fail. This is because opening and closing statements fall under the rubric of "trial strategy." Id., at ¶ 14, 18. As previously stated, a reviewing court must refrain from second-guessing trial strategy decisions. *State v. Adams*, 103 Ohio St.3d 508, supra, at ¶ 31; *Strickland v. Washington* (1984), 466 U.S. 668, 689.

{¶ 246} For all of the foregoing reasons, we find that appellant has failed to establish a claim for ineffective assistance of counsel. Accordingly, his fifth assignment of error is found not well-taken.

{¶ 247} Appellant argues in his sixth assignment of error that his right to a fair trial was compromised by prejudicial prosecutorial overreaching and misconduct. In reviewing a claim for prosecutorial misconduct, an appellate court must determine: (1) whether the prosecutor's actions were improper; and (2) if so, whether the prosecutor's remarks prejudicially affected the substantive rights of the defendant. *State v. Smith* (1984), 14 Ohio St.3d 13, 14, citing *United States v. Dorr* (C.A.5. 1981), 636

F.2d 117, 120. The analysis must focus on "the fairness of the trial, not the culpability of the prosecutor." *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶ 231, citing *Smith v. Phillips* (1982), 455 U.S. 209, 219. The prosecutor's conduct cannot serve as grounds for a new trial unless such conduct deprives the defendant of a fair trial. *State v. Keenan* (1993),66 Ohio St.3d 402, 405.

{¶ 248} "Even where a prosecutor's statements during closing arguments are improper, reversal based upon those statements is warranted only if the statements permeate the entire atmosphere of the trial." *State v. Walls* (Dec. 11, 2000), 12th Dist. No. CA99-10-174. An appellate court must bear in mind when reviewing the record that both the defense and the prosecution are given wide latitude in their arguments as to what the evidence has shown and what reasonable inferences may be drawn therefrom. Id.

{¶ 249} When evaluating the prosecutor's arguments for possible misconduct, the court must review the argument as a whole and in relation to that of opposing counsel. Id., citing *State v. Moritz* (1980),63 Ohio St.2d 150, 157-158. If the prosecutor does state an opinion, it must be based on the

evidence presented, and not on personal beliefs. See *State v. Watson* (1991), 61 Ohio St.3d 1, 10.

{¶ 250} In this assignment of error, appellant suggests that the state in its closing "disavowed" previously-admitted evidence of "devil-worship." Specifically, appellant objects to that portion of the state's closing argument wherein the prosecutor stated:

{¶ 251} "You listened to this evidence. You heard what took place in the sacristy. Is this some sort of satanic cult killing? No. Was this part of some ritualistic black mass? No. Sorry to disappoint. This case is about perhaps the most common scenario there is for a homicide. A man got very angry at a woman, and the woman died. The only thing different is the man wore a white collar, and the woman wore a habit."

{¶ 252} Appellant argues that these remarks constitute "misconduct" and demonstrate a prejudicial "bait and switch tactic" on the part of the state. Contrary to appellant's contention, the state never offered the "bait" that this homicide was a satanic endeavor on the part of appellant. Instead, throughout the trial, the state's position was that appellant was motivated by anger with Sister Pahl. This motive was suggested by the state in its opening

statement and then supported by the state's evidence at trial. During closing argument, the state summarized the evidence and explained how it supported the state's theory that anger motivated this crime.

{¶ 253} In a related argument, appellant takes issue with the state's argument that this was a case involving anger, "since there was *no evidence* that appellant had ever been violent or *even angry* with anyone in his lifetime * * *." (Emphasis in original.) But, in fact, there was evidence that the perpetrator was angry. Det. Marx testified that the sheer number of stab wounds that the assailant inflicted upon the victim were indicative of a high level of anger on the part of the assailant. In addition, Father Grob repeatedly testified that what took place in the sacristy was meant to mock the victim, the Catholic Church, or God. On the basis of this evidence, the jury could reasonably have inferred that the perpetrator was angry. Other evidence that was presented by the state permitted the inference that appellant was the perpetrator.

{¶ 254} Appellant next objects to the state's arguments concerning the blood found on the victim's forehead -- in particular, to the state's argument that appellant used his letter opener to "anoint the victim

in her own blood" in a "bastardized version of the last rites." But the evidence did show an obvious, circular, mark of blood on the victim's forehead without any corresponding wound to explain the blood. The evidence also showed that at some point the entire letter opener was saturated with blood from the tip to the hilt, and that the circular stain on Sister Pahl's forehead was consistent, in size and shape, with a raised circular surface that was located near the letter opener's hilt. From this evidence, the jury could reasonably have inferred that the killer caused the entire letter opener to be coated with blood and then placed the blood-soaked letter opener across Sister Pahl's forehead in an act mirroring the anointing process of the Catholic ritual of last rites. Testimony by Father Grob established that the ritual of the last rites involves the anointing of the forehead of a dying person, and is an act which can only be performed by a priest. Based on the foregoing, we find that the state's arguments were fairly based on reasonable inferences and, therefore, were proper.

{¶ 255} Next, appellant claims error because the state argued that the assailant "carved" an upside-down cross in her chest. At trial, Det. Cousino testified that the nine stab marks that outlined an upside-down cross pattern in the altar cloth that had

covered Sister Pahl's chest were also observable in the smock that Sister Pahl was wearing at the time of her death. Although this testimony specifically refers to stab marks that were on cloths that were covering the victim's body, and not necessarily to stab marks that were on the victim's body, we note that such testimony was not contradicted by any autopsy findings. As indicated above, trial counsel are granted wide latitude in summation as to what the evidence has shown and what reasonable inferences may be drawn therefrom. *State v. Walls*, supra. Further, we do not find that the state's comment, when viewed within the state's argument as a whole, prejudicially affected appellant's substantive rights. See *State v. Smith*, supra, at 14.

{¶ 256} Appellant also claims reversible error based on the state's argument that the evidence showed that the victim had been vaginally penetrated. The autopsy confirmed evidence of a scratch on the right side of the victim's labium and hymen. In addition, there was a police report containing Dr. Fazekas' opinion that the abrasion may have been caused by a fingernail or a rough instrument, and may have been inflicted to mislead investigators into thinking a rape had been committed. Thus, there was sufficient foundation for

the prosecutor's argument that the victim had been penetrated. The prosecutor did not suggest that the penetration was conducted for purposes of sexual gratification, but rather that it was conducted as an expression of anger and degradation.

{¶ 257} Appellant also objects to the state's arguments that the DNA that was found in the sacristy was the result of contamination. In making this argument, the state was merely summarizing evidence presented at trial which indicated that, although efforts were made to test those involved in the chain of custody of Sister Pahl's clothing, the list of those tested was not exhaustive, and that many who came in contact with the murder scene, especially after Sister Pahl's body was discovered - such as the emergency medical team - could have contaminated the evidence. The significance of the DNA evidence, and the fact that such evidence could have been the result of contamination, were properly argued by the state in this case.

{¶ 258} Next, appellant objects to the state's characterization of appellant's expert witness, Kathleen Reichs, Ph.D., as a "hired gun." The state's primary criticisms of this expert were that she never examined the evidence and that she never attempted to discuss her opinions with the other experts in the

case. In referring to Reichs as a "hired-gun," the state did not act improperly, nor did it affect appellant's substantive rights. See *State v. Smith*, supra, at 14.

{¶ 259} The prosecutor also made a comment in response to defense counsel's contention that a nickel could have made a blood transfer stain, rather than the letter opener's medallion, because "a picture of Congress" is on the back of a nickel. The state's comment was, "[I]f you see [defense counsel] on the street, do not take a nickel from him because the Capitol Building is not on the back of a nickel. The Monticello is." Defense counsel countered this comment by joking, "I only have dollar bills." In addition, the prosecutor made a comment with regard to defense counsel's tracing of one of the bloodstains on the altar cloth, stating that it looked like the drawing of a third-grader. Neither of these comments was improper. Nor did they prejudicially affect appellant's substantive rights. See *State v. Smith*, supra, at 14.

{¶ 260} Finally, appellant argues that the state improperly made a "golden rule" type of argument. "Golden rule" arguments are generally prohibited in closing arguments. *City of Akron v. Norman*, 9th Dist. No. 22743, 2006-Ohio-769, ¶ 27. The reason they are prohibited is that they improperly seek to invoke

the sympathy or prejudice of the jury by asking the jury to step into the shoes of another. *State v. Roberson* (June 23, 1982), 5th Dist. No. 5828. As stated by the court in *State v. Roberson*:

{¶ 261} "The 'golden rule' technique of argument to a jury runs afoul of [the] clear limitation upon the right of the attorney to comment upon the evidence as opposed to appealing to the passion or sympathy of the jury. 'Do unto others as you would do unto me' carries an improper implication in final argument." Id.

{¶ 262} In this case, the prosecutor's request that the jury bring justice for Sister Pahl was not only proper, but it was patently not a "golden rule" request, because the prosecutor did not ask that the jury put itself in the shoes of the victim.

{¶ 263} We note, in our examination of this particular assignment of error, that the trial court specifically instructed the jury that closing arguments are not to be considered evidence. Because the jury is presumed to follow the trial court's instructions, *State v. Raglin* (1998), 83 Ohio St.3d 253, 264, we presume that the jury followed this instruction in its deliberations and based its conviction upon the evidence alone.

{¶ 264} We additionally note that appellant's trial counsel failed to object to many of the state's closing remarks. When a defendant fails to object to the state's remarks made during closing arguments, a plain error analysis under Crim.R. 52(B) is required. *State v. Poling*, 11th Dist. No. 2004-P-0044, 2006-Ohio-1088, ¶ 33. "'Plain error does not exist unless, but for the error, the outcome at trial would have been different.'" Id., quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, at 282. Under this standard, appellant clearly fails to establish that there was prosecutorial misconduct in this case.

{¶ 265} Even without the plain error analysis, however, we find that appellant simply has not established either that the state's closing arguments were improper or that they prejudicially affected his substantive rights. See *State v. Smith*, supra, at 14. Accordingly, appellant's sixth assignment of error is found not well-taken.

{¶ 266} Appellant argues in his seventh assignment of error that the trial court erred in denying his motion to suppress his 2004 statements to police.

{¶ 267} Appellate review of a trial court's decision to grant or deny a motion to suppress presents a mixed question of law and fact. *State v.*

*Cheadle*, 11th Dist. No. 2007-P-0083, 2008-Ohio-2393, ¶ 10. In conducting this review, we accept the trial court's findings of fact, as long as they are supported by competent and credible evidence. Id. Upon accepting the trial court's factual determinations, we conduct a de novo review to determine whether the legal standard has been satisfied. *State v. Jeffries*, 11th Dist. No. 2005-L-057, 2007-Ohio-3366, ¶ 56.

{¶ 268} In the instant case, appellant argues that evidence obtained during his April 23, 2004 interview with police should have been suppressed, because prior to the interview he was not advised of his rights pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436.

{¶ 269} Only a 'custodial interrogation' triggers the requirement to provide *Miranda* warnings. *State v. Mason* (1998),82 Ohio St.3d 144, 153; see also, *State v. Gumm* (1995), 73 Ohio St.3d 413, 429; *State v. Luke*, 3d Dist. No. 1-06-103, 2007-Ohio-5906, ¶ 10. "Custodial interrogation" has been defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, supra, at 444.

{¶ 270} "In determining whether an individual was in custody, a court must examine all of the

circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'" *Stansbury v. California* (1994), 511 U.S. 318, 322, quoting *California v. Beheler*, 463 U.S. 1121, 1125. To determine whether a custodial interrogation has occurred, a court must decide how a reasonable man in the suspect's position would have understood his situation. *Mason*, supra, at 154, quoting *Berkemer v. McCarty* (1984), 468 U.S. 420, 442.

{¶ 271} As long as it remains undisclosed, a police officer's subjective view that an individual under questioning is a suspect has no bearing upon the question of whether that individual is in custody. *Stansbury*, supra, at 324. But if the officer's knowledge or belief is conveyed -- either by word or deed -- to the individual being questioned, such knowledge or belief may bear upon the issue of custody, but only to the extent that it would have affected how a reasonable person in the position of the individual being questioned would have perceived his freedom to leave. Id., at 325.

{¶ 272} In the instant case, the trial court made the following relevant factual determinations, all of which were supported by competent and

credible evidence. The April 23, 2004 interview took place in appellant's home. The interview was conducted by officers wearing plainclothes, who knocked on appellant's door. When appellant answered the door, the officers identified themselves and indicated to him that they wanted to question him about the April 1980 death of Sister Pahl.

{¶ 273} Appellant invited the investigators into his home, and offered them seats in the living room. During the entire 1-1 1/2 hours during which the interview took place, appellant was never handcuffed, restrained, threatened, or told that he could not leave. Appellant, himself, did not instruct the investigators to leave. Nor did he ask for an attorney or attempt to leave the residence.

{¶ 274} Applying these facts to the applicable law, we conclude that a reasonable man in appellant's position would have understood that, during the interview, there was no formal arrest or restraint on his freedom of movement of the degree associated with a formal arrest. See *Stansbury*, supra, at 322. Accordingly, we find that appellant was not subject to custodial interrogation during his interview of April 23, 2004. Appellant's motion to suppress was properly denied.

{¶ 275} In an effort to avoid this conclusion, appellant points out that appellant had long been the focus of the police investigation and that during the course of the interview he was actually accused by the investigators of killing Sister Pahl. Review of the testimony reveals that this accusation occurred at the "very end" of the interview, after appellant had told Ross that he had exclusive control over the letter opener that was believed to be the murder weapon. Following the accusation, police and appellant had no additional discussion.

{¶ 276} Based on the foregoing, we find that because the investigators' belief about appellant's guilt became known to appellant only at the very end of the interview, when appellant heard Ross' accusation, such belief would not have affected how a reasonable person in appellant's position would have perceived his freedom to leave during the previous 1-1 1/2 hour period when the interview actually took place. See *Stansbury*, supra, at 324.

{¶ 277} For all of the foregoing reasons, appellant's seventh assignment of error is found not well-taken.

{¶ 278} Finally, in his eighth assignment of error, appellant argues that he is entitled to a reversal of his conviction because, when viewed

cumulatively, the otherwise harmless errors that were committed in the trial court deprived appellant of a fair trial.

{¶ 279} We have stated that "although a particular error by itself may not constitute prejudicial error, the cumulative effect of the errors may deprive a defendant of a fair trial and may warrant the reversal of his conviction." *State v. Hemsley*, 6th Dist. No. WM-02-010, 2003-Ohio-5192, ¶ 32, citing *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus. "'However, in order even to consider whether "cumulative" error is present, we would first have to find that multiple errors were committed in this case.'" Id., at ¶ 32, quoting *State v. Madrigal*, 87 Ohio St.3d 378, 398, 2000-Ohio-448. In light of our findings with respect to the other assignments of error, we find the eighth assignment of error not well-taken.

{¶ 280} This conclusion is not altered by additional so-called "errors" that appellant brings to the court's attention, for the first time, in this assignment of error. First, appellant argues that it was error that the jury was permitted to speculate "about the content of appellant's admittedly unintelligible videotaped 2004 statement." In this statement, which lasted one hour and 28 minutes,

appellant was interviewed at a police station. At the very end of the interview, appellant was left alone in the interview room for three minutes and 15 seconds. While alone, appellant can be heard mumbling to himself. The admission of this final portion of the interview does not constitute reversible error. Not only did appellant fail to object to this portion of the tape, his defense team wanted it played and tried its best to make this portion of the tape audible for the jury.

{¶ 281} Appellant also claims error because two witnesses, namely Jerry Tressler and Rose Byers, saw part of the trial proceedings on television. These two witnesses were under no explicit order to refrain from watching television coverage. These witnesses were questioned on voir dire by the court and counsel. Jones expressly stated that what little she heard on television would not affect her testimony. The trial court agreed. Tressler stated that what he saw on television would not influence his in-court testimony. The trial court ruled that the testimony of both witnesses was admissible. We note that, pursuant to Evid.R. 103, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]" Appellant had a full opportunity to

cross-examine as to the weight to be given the testimony. No error of any kind occurred.

{¶ 282} Appellant also claims that various hearsay statements were admitted into evidence which resulted in error in this case. Specifically, appellant complains about the following testimony that came into evidence, over appellant's objection, through the testimony of Det. Forrester: (1) Scala-Barnett's opinion that the letter opener was consistent with the puncture wounds; (2) Scala-Barnett's opinion that scissors were not used; (3) Cousino's inverted-cross opinion; (4) Sutton's transfer pattern opinion; and (5) Grob's opinion as to knowledge of religion or anti-religion. Appellant additionally complains that investigator Ross repeated the opinions offered by Scala-Barnett and Cousino.

{¶ 283} We initially observe that none of the referenced statements constituted hearsay, because they were not offered for the truth of the matter asserted. See Evid.R. 801(C). They were offered to explain the sequence of how the cold case portion of the investigation developed. We additionally observe that the "declarant" of each of the challenged statements had already testified in detail before anything was later repeated by subsequent

witnesses. Thus, by the time Forrester and Ross gave the testimony to which appellant objects, the jury had already heard the testimony, which was properly admitted and subjected to thorough cross-examination by the defense.

{¶ 284} Appellant next claims error because the state referenced a letter written by Father Ray Fisher while cross-examining defense witness Deputy Police Chief Ray Vetter. During the state's cross-examination, Vetter was asked if he made certain statements that were attributed to him and referenced in a letter authored by Father Ray Fisher to Bishop Hoffman of the Catholic Diocese. We note that referring to a document during cross-examination is not improper. And appellant could have offered the letter into evidence had he so desired.

{¶ 285} Lastly, appellant complains that the jury did not receive proper instructions on the law of circumstantial evidence and on the presumptive nature of the 1980 coroner's verdict. In fact, the trial court did give proper instruction as to the law of circumstantial evidence. And the defense never requested an instruction as to a coroner's verdict.

{¶ 286} For all of the foregoing reasons, the judgment of the trial court is affirmed. Appellant is

ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

**JUDGMENT AFFIRMED.**

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

| | |
|---|---|
| Peter M. Handwork, J. | /s/ Peter M. Handwork<br>JUDGE |
| Mark L. Pietrykowski, P.J. | /s/ Mark L. Pietrykowski<br>JUDGE |
| William J. Skow, J.<br>CONCUR. | /s/ William J. Skow<br>JUDGE |

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
http://www.sconet.state.oh.us/rod/newpdf/?source=6

IN THE COURT OF COMMON PLEAS OF
LUCAS COUNTY, OHIO

STATE OF OHIO
Plaintiff,

Case No. CR04-01915

v.

JUDGE
THOMAS J. OSOWIK

GERALD ROBINSON
Defendant.

FILED
March 20, 2006
Lucas County
Common Pleas
Court

**JUDGMENT ENTRY**

This matter came before the court on the defendant's motion to suppress any statements made to law enforcement officials and to further suppress any evidence obtained from the disclosure of those statements.

The matter proceeded to an evidentiary hearing.

THE 1980 INTERVIEW

The defendant moves this court for an order compelling the prosecution to provide audio tapes as well as any supplemental notes, police reports or summaries regarding interviews with the defendant

on or about April 18 and 19 of 1980. The defendant further moves the court for an order prohibiting the testimony of Detectives Marx and Kina if the prosecution cannot produce such evidence.

The Court finds from the evidence adduced at hearing that sometime in the late afternoon or early evening hours of April 18, 1980, Detective Art Marx and William Kina interviewed the defendant at the Toledo Police Department. According to their testimony, in April of 1980, it was not Toledo Police Department's policy to tape record interviews with suspects. This is undisputed testimony. Thus, the Court finds that the April 18 and 19, 1980 interviews by Detective Marx and Kina were not tape recorded therefore, no recordings exist.

The testimony further establishes that Detective Art Marx may have taken written notes of his interview with the defendant nearly twenty-six years ago. Detective Marx also made a report that referred the defendant for a polygraph examination. These reports from April of 1980 cannot be located by the prosecution and therefore, are note able to be produced by the prosecution.

The defendant contends that the written notes and any supplemental notes concerning the polygraph examination are crucial to his defense.

The United States Supreme Court held in Arizona v. Youngblood (1988), 488 U.S. 51, 57-58, 109 S. Ct. 333, 337, 102 L.Ed.2d 281, 289 as follows:

"The Due Process Clause of the Fourteenth Amendment makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence.

Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed."

Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process."

The written notes from the 1980 interveiw(s) could be potentially useful to the defendant. However, the burden is placed upon the defendant to

establish that the police exercised bad faith in their failure to preserve these notes.

The term "bad faith" generally implies something more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another. State v. Bruce 2003 WL 1756433 (Ohio App. 5 Dist).

In consideration of the testimony of the fact that the interview occurred almost twenty-six years ago, the court finds that the defendant is unable to establish bad faith by the Toledo Police Department.

The defendant further argues that these notes are materially exculpatory evidence and as such, the defendant's due process rights have been violated.

With respect to this argument, the analysis by the court is different.

Again, the court is placed in a position of divining the importance of materials whose contents

are unknown. It has been held that evidence shall be deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defendant, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine the confidence in the outcome. See State v. Bruce, id., at 634. The Court finds that these are notes of an interview and possibly supplemental notes to a polygrapher. The defendant is not contending that he did not receive the polygraph examination.

This inquiry is confined to notes of an interview with the defendant and notes of referral to a polygrapher. These statements would be of questionable admissibility by the prosecution. Any exculpatory statements would have been made by the defendant and considered self-serving. Under Evidence Rule 801(D)(2) such statements are admissible if offered against the party.

In reviewing the testimony, the defendant has failed to establish that the notes or supplemental notes of the April 18 and 19, 1980 interview(s) could be deemed to contain materially exculpatory evidence to his defense.

The defendant cites the recent court of appeals decision in the case of State v. Durnwald (2005) 163 Ohio App. 3d. 361. In that case, the defendant was arrested and charged with driving under the influence. The State Trooper failed to preserve the videotape of the defendant at the time of the arrest. The Court found that this was direct, independent evidence of the defendant's physical condition at the of his arrest. The Court found that the videotape was the defendant's only means to refute the officer's testimony concerning the defendant's physical condition. The Court found that this videotape was unique and unattainable by other means. That case is clearly distinguishable from the case at bar. In that case, an element of the prosecution's case and therefore, the defendant's defense was, in fact, the physical condition of the defendant. In the defendant's case before the court, the issue involves notes, the contents of which may include statements by the defendant himself, which he contends were exculpatory. The source of any of these statements was the defendant himself.

The Court finds that the defendant has been unable to establish that the notes would have contained materially exculpatory evidence.

## THE APRIL 2004 INTERVIEW

The Court finds that on the afternoon of April 4, 2004, Detectives Steve Forrester and Thomas Ross arrived at the residence of the defendant at Nebraska Ave., Toledo, Lucas County, Ohio.

The testimony established that at about 3:30 P.M. on that afternoon on April 4, 2004, these detectives arrived at the defendant's residence in their unmarked vehicle. The car was parked in the defendant's driveway. The officers, wearing plainclothes, knocked on the door. The defendant answered the door. The detectives identified themselves as investigators with the cold case squad and presented the defendant with their business cards. They then indicated to the defendant that they wanted to question the defendant about the April 1980 death of Sister Margaret Ann Paul.

The detectives specifically wanted to question the defendant about possible inconsistencies in his answers to questions presented by detective Art Marx in 1980.

Having been so introduced and informed about the purpose of the visit, the defendant then invited Detective Ross and Forrester in to his home.

The defendant sat in his reclining chair and the two detectives sat on the couch in the defendant's living room. A number of questions were asked of the defendant. This portion of the interview lasted approximately forty-five minutes in total.

At this juncture in the in the interview, Detective Ross wanted to display a number of photographs and asked the defendant to comment. The defendant suggested that the kitchen table would have more room for such a display. Detective Ross accompanied the defendant to the kitchen where the photographs were displayed on the kitchen table. Detective Forrester remained in the living room.

The interview in the kitchen lasted between 15 and 30 minutes. The defendant was not restrained nor were any statements made to the defendant of a threatening nature that would lead a reasonable person in his own home to believe that he was not otherwise free to leave. There was no evidence of

coercive conduct on the part of either of the detectives.

The defendant did not instruct the detectives to leave. He did not ask for an attorney nor did he attempt to leave the residence.

After a period of questioning that lasted between one and one-half hours, the defendant was advised that he was under arrest for the murder of Sister Margaret Ann Paul. The detectives then escorted the defendant to the Scott Park Police Station which was approximately one hundred yards from his house.

The defendant argues that any statements made by the defendant during the course of this interview should be stricken as being contrary to the Fourth Amendment of the United States Constitution. Specifically, the defendant maintains that this interview was, in fact, a custodial interrogation, thereby invoking the necessary Miranda protections.

In Miranda, the Supreme Court recognized that a custodial interrogation exacts a heavy toll on

individual liberty and trades on the weakness of individuals. In an incommunicado police-dominated atmosphere, individuals succumb.

The Fifth Amendment to the United States Constitution states that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Based on this right, the Supreme Court held in Miranda v. Arizona that criminal suspect could not be subject to a custodial interrogation without first being informed of his right to remain silent and his right to counsel.

Any analysis must begin by stating the basic premise that a duty to administer Miranda warnings arises only when an accused is taken into custody. Miranda v. Arizona (1966), 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694. For purposes of Miranda warnings, "custody" is defined as a formal arrest or restraint on the freedom of movement to the degree associated with a formal arrest. State v. Mason (1998), 82 Ohio St.3d 144, 154, 694 N.E. 2d 932.

In order to determine whether a person was in custody, the court must apply a totality-of-circumstances test, including where the interrogation

occurred, whether the investigation had focused on the subject, whether the objective indicia of arrest were present, and the length of the questioning involved. Stansbury v. California (1994), 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d 293.

In this respect, the defendant asserts that here were objective indications of arrest at the time of the interview. More specifically, the defendant claims that Detective Ross became more focused when the interview moved to the kitchen and further claims that the questions had a more focused "tone." The defendant further asserts that Detective Ross is larger in stature than the defendant and that Detective Forrester was carrying a gun. However, there is no evidence that Detective Ross physically manhandled the defendant or intimidated the defendant. The interview appeared to be conversational in tone with the defendant seated in his reclining chair and the detectives seated in a couch in the defendant's living room. Further, there is no evidence that either detective displayed his weapon nor that it could even be seen by the defendant.

The defendant asserts that the court must also consider the subjective intent of the officers. In support, the defendant points out a statement by Detective Ross that "Father, I believe you killed Sister, how do you explain all this kind of stuff." The defendant argues that when a subjective belief is expressed the court should consider its expression as an objective factor and part of the totality of the circumstance.

The defendant is correct in stating that the court in Stansbury established that an officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned. Michigan v. Chesternut, 486 U.S. 567, 575, n. 7 108 S.Ct. 1975, 1980, n.7, 100 L.Ed.2d 565 (1988) (citing United States v. Mendenhall, 446 U.S. 544, 554 n.6, 100 S.Ct. 1870, 1877, n. 6, 64 L.Ed.2d 497 (1980) (opinion of Stewart, J.)).

However, the Stansbury Court also pointed out that those beliefs are relevant only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action.'

In fact, the Stansbury Court pointed out:
"Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest. The weight and pertinence of any communications regarding the officer's degree of suspicion will depend upon the facts and circumstances of the particular case. In sum, an officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave." Id. At. 325.

Therefore, Detective Ross' statement to the defendant that he believed the defendant "killed Sister" is but one factor to consider in determining whether the interview constituted a custodial interrogation. The defendant was in his own kitchen and the other detective was in the living room. There

is no evidence that would indicate that his statement, in consideration of the totality of the circumstances, would lead a reasonable person to conclude he was in custody, thereby transforming the interview into a custodial interrogation in his own home.

The defendant further argues that the detective, by being seated in a couch in defendant's living room, had placed the defendant in custody.

There is no evidence that the detective had re-arranged the furniture in the defendant's house. To the contrary, the detectives were invited into the house by the defendant. The defendant argues that the couch on which the detectives were seated was placed between the door and the defendant, thereby blocking his freedom of movement. While a schematic diagram was not offered into evidence, it does appear from the testimony that the detectives entered through the same door. Therefore, one must conclude that the couch wasn't blocking the door. Presumably, the house also had a rear exit, despite the lack of testimony on this point.

## INTERVIEW AT THE STATION

The defendant has not contended that any statements made by the defendant at the Scott Park Police Station subsequent to his arrest are subject to suppression. The Court finds that the defendant did not exercise his Fifth Amendment right to counsel during this interview and his statements, if any, are not subject to suppression.

## CONCLUSION

Thus, the Court concludes that defendant has been unable to establish his burden of proof to demonstrate the exculpatory nature of the 1980 notes of interviews with the defendant. The defendant's motion to compel and motion in limine must be DENIED.

Thus, the Court concludes that the April 2004 interview with the defendant at his home was not a custodial interrogation. For the foregoing reasons, the defendant's his motion to suppress statements from the April 2004 interview is DENIED.

_____ /s/ Thomas J. Osowik

Date JUDGE THOMAS J. OSOWIK

Re: Gerald Robinson: CR200401915

PRAECIPE

TO THE CLERK:

Within three days of journalization, please serve upon all parties notice of judgment in a manner prescribed by Civ. R.5(B) and note the service in the appearance docket (see below).

Dated:_____ /s/ Thomas J. Osowik
JUDGE THOMAS J. OSOWIK

Dean Mandross, Esq.
J. Christopher Anderson, Esq.
Assistant Lucas County Prosecutor
Lucas County Courthouse
Toledo, OH 43624

Alan Konop, Esq.
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Toledo, OH 43624-1606

IN THE COMMON PLEAS COURT,
LUCAS COUNTY, OHIO

| | | |
|---|---|---|
| STATE OF OHIO | * | Case No. |
| Plaintiff, | * | G-4801-CR-0200401915-000 |
| | * | |
| v. | * | **ORDER** |
| | * | |
| GERALD ROBINSON | | |
| Defendant. | * | JUDGE |
| | * | THOMAS J. OSOWIK |

FILED
May 11, 2006
Lucas County
Common Pleas
Court

* * * * * * * *

May 11, 2006. Court Reporter LYNETTE SHINDORF, Assistant Prosecutors DEAN MANDROSS, J CHRISTOPHER ANDERSON and LAWRENCE KIROFF on behalf of the State of Ohio. JOHN B. THEBES, ALAN KONOP, JOHN CALLAHAN and NICOLE KOUHRY all on behalf of the Defendant, and Defendant GERALD ROBINSON present in court.

Jury continued to deliberations. Jury returned with a verdict. Verdict is read in open Court. The members of the jury are polled.

Defendant found Guilty by jury of the offense of Murder the sole count of the indictment in violation of R.C. 2903.02 an unclassified felony.

Matter proceeded to sentencing. This Court having afforded the Defendant and defense counsel the rights pursuant to Criminal Rule 32(A)(1) to make a statement on the defendant's behalf.

It is the sentence of the Court that the defendant be sentenced to the Ohio Department of Rehabilitation and Corrections for a indefinite term of 15 years to life.

Defendant notified of his appellate rights pursuant to Criminal Rule 32. Defendant declined to have appellate counsel appointed.

Defendant is ordered conveyed to the custody of the Ohio Department of Rehabilitation and Corrections forthwith. Credit for 12 days is granted as of this date along with future custody days while defendant awaits transportation to the appropriate state institution.

Defendant is not found to have or reasonably expected to have the means to pay all or part of the applicable costs. Therefore all court costs are waived.

Defendant is remanded into custody of the Lucas County Sheriff's Department.

/s/ Thomas J. Osowik
JUDGE THOMAS J. OSOWIK

# THE SUPREME COURT OF OHIO

State of Ohio

v. Case No. 2008-1666

Gerald Robinson

FILED
Dec. 31, 2008

Clerk of Court
Supreme Court of
Ohio

**ENTRY**

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

(Lucas County Court of Appeals; No. L061182)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

3

No. 08-1188

FILED
JUN 24 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
# Supreme Court of the United States

GERALD ROBINSON,

*Petitioner,*

v.

STATE OF OHIO,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Ohio Court Of Appeals For The Sixth Appellate District**

## BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does this Court's precedent provide a functional definition of "actual prejudice" sufficient to answer the Due Process question of when a pre-prosecution delay claim is ripe for adjudication?

2. Should the holdings of *United States v. Marion*, 404 U.S. 307 (1971) and *United States v. Lovasco*, 431 U.S. 783 (1977) be altered in pre-prosecution delay cases to require that once a defendant has proved that the government's delay in filing charges has caused actual substantial prejudice to his case, that the court must then engage in a balancing test where the government's reasons for the delay are judged against the prejudice established by the defendant?

## LIST OF PARTIES

The petitioner is Gerald Robinson, an inmate of the Ohio Department of Corrections.

The respondent is the State of Ohio, by and through the Lucas County Prosecutor's Office.

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## INTRODUCTION

The thrust of Robinson's request for certiorari is his claim that the Ohio appellate court misapplied this Court's precedent requiring a finding of substantial actual prejudice and his disagreement with the second prong of the *Marion/Lovasco* test as it relates to preindictment delay. Additionally, he asks this court to reassess the lower court's factual findings in hopes that he will be able to meet the new standard that he asks this Court to adopt.

Robinson's petition raises three issues, none of which are worthy of this Court's review. In his first claim, he asks this Court to amend its previous holdings in *United States v. Lovasco*, 431 U.S. 783 (1977) and *United States v. Marion*, 404 U.S. 307 (1971), to create an all-encompassing definition for the phrase "actual prejudice." Such a rewrite of *Marion* and *Lovasco* is unwarranted since this Court has already ruled that "actual prejudice" must be determined on a case by case basis.

Robinson's second claim is that his rights under the Fifth and Sixth Amendments were violated because the deaths of certain potential witnesses denied him a meaningful opportunity to present a complete defense. The fact of the matter is that all the relevant statements of the unavailable witnesses were admitted into evidence from police reports of their interviews pursuant to Robinson's request. Whatever additional information petitioner claims he lacks from these people is a matter of pure speculation.

Finally, there is not a compelling reason for this Court to accept jurisdiction because this case is not of public or great general interest, and, even if Robinson's claims were granted, it would not change the result because Ohio law already embodies the balancing test he asks this Court to impose on the federal system.

In short, he simply disagrees with the standards established in *Marion* and *Lovasco* and asks this Court to change them. The Court should deny this petition.

## COUNTERSTATEMENT

### A. Robinson was convicted for the murder of a 71-year-old nun.

At approximately 8:20 a.m. on Saturday, April 5, 1980, the body of a seventy-one-year-old nun, Sister Margaret Ann Pahl, was found in the sacristy of the chapel in Mercy Hospital in Toledo, Ohio. The victim was last seen alive shortly before 7:00 a.m. that morning. Sister Pahl had been strangled and stabbed thirty-one times.

Sister Gordon entered the chapel on that Holy Saturday morning at about 7:30 a.m. At approximately 8:20 a.m., she went to the sacristy to use the telephone. There she discovered Sister Pahl's lifeless body.

The hospital chapel, which contained the sacristy where Sister Pahl's body was discovered, was continuously occupied by various nuns from approximately 7:30 a.m. that morning until Sister Pahl's body was discovered at 8:20 a.m.. Thus, the homicide occurred sometime between 7:00 a.m. and 7:30 a.m.. Petitioner has always claimed that he remained in his living quarters that morning until after Sister Pahl's body was discovered.

Toledo Police detectives arrived at the hospital within minutes and started their investigation. By the end of the first day, investigators had arrived at two conclusions. First, Sister Pahl had not interrupted a burglary or robbery. An inventory of the sacristy and the chapel revealed that nothing of value was missing. Additionally, Sister Pahl's purse was recovered from inside the sacristy.

Second, from the number of stab wounds, investigators inferred that the murderer was a very angry person who probably knew Sister Pahl, not a stranger. Moreover, in examining Sister Pahl's hands, there were no defensive wounds and the sacristy itself was in order with no signs of a struggle. These factors were indicative of the victim and the killer knowing one another.

On Sunday, April 6, 1980, detectives received information from the coroner's office that the blade of the weapon used to inflict the stab wounds was no more than one-half inch in width and at least three

inches in length. By Monday, April 7, 1980, investigators believed that, despite Sister Pahl being found in a state of near nudity, this crime was not sexually motivated. There was no evidence of rape.

On Wednesday, April 9, 1980, police interviewed Shirley Lucas, a housekeeper at Mercy Hospital, who told them that Sister Pahl, after a meeting with one of the two hospital priests, had been upset to the point of tears on Good Friday afternoon, April 4, 1980. When Sister Pahl gave Ms. Lucas the key to clean the convent, Sister told her that she was waiting to talk to "Father" about the changes he wanted to make for Easter Sunday Services. When Ms. Lucas returned the key after completing her cleaning duties, Sister Pahl was literally in tears, crying, "Why do they cheat God out of what belongs to Him?" This appeared to be a reaction to her just concluded talk with "Father."

The next morning, Sister Pahl was found dead in the chapel sacristy. While Ms. Lucas did not know which of the two priests Sister Pahl had been referring to, Assistant Chaplain Swiatecki was in the dining room at the time of the murder. At about 7:00 a.m., Leslie Kerner saw the petitioner by the chapel doors, and, at about 7:30 a.m., Grace Jones saw him walking out of the chapel, the exact time frame of the murder.

On April 12, 13 and 14, 1980, police interviewed Mercy Hospital employees who reported hearing, near the time of the murder, frantic footsteps down a

hallway leading from the chapel to a hallway which led to the apartment that the petitioner occupied.

After thirteen days of investigation, the police believed the evidence led to the petitioner as the principal suspect, and they asked him to appear at the Toledo Police Department for an interview on Friday, April 18, 1980. During this interview, petitioner claimed that the "true killer" came to him and admitted to the murder of Sister Pahl. When pressed for details and specifics, the petitioner acknowledged that this statement was a lie and that he had made the story up to protect himself.

Police then searched Robinson's residence and recovered an eight inch long sword-shaped letter opener with a blade approximately one-half inch wide. This letter opener was later found to have a fleck of material which tested presumptively positive for blood on three separate occasions.

Near the end of April 1980, Toledo Police presented their evidence to the Lucas County Prosecutor's Office for assessment. At that time, the Prosecutor's Office declined to present the matter to the grand jury because of insufficient evidence.

The Toledo Police Department continued to attempt to develop further evidence as to this homicide for years after April 1980. The case supervisor kept investigating the murder until he retired in the latter part of 1981. The lead detective also continued to investigate until he retired in 1998. In 1999, the Toledo Police Department submitted the murder

weapon to BCI for testing. While the letter opener again tested presumptively positive for the presence of blood, there was insufficient matter for a conclusive DNA result.

On December 2, 2003, Lucas County Cold Case Investigators received a letter in which a nun accused Robinson of sadomasochistic sexual abuse. Thereafter, on December 8, 2003, investigators interviewed the nun who had sent the letter as to her allegations of being raped by the petitioner. During the interview, the author of the letter advised the police that they should look for markings of an upside down cross on Sister Pahl's chest.

In the weeks that followed, investigators located and examined the physical evidence, interviewed original investigating officers, re-interviewed witnesses, and had physical evidence examined by specialized experts. Investigators did in fact discover the outline of an upside down cross on an altar cloth which had covered the victim's chest.

On April 23, 2004, investigators went to petitioner's home with the intention of interviewing him and conducting a search of his premises. During the questioning, the petitioner, for the first time, admitted that he never loaned the murder weapon to anyone, that he never had cut himself with it and that he had always locked his apartment door. Additionally, contrary to church practice, the petitioner claimed he never had a key to the sacristy because he had no reason to ever go into that room. Petitioner told

the investigators that he did not leave his apartment the morning of the murder or have any knowledge of the homicide until after learning of her death from a phone call. At the conclusion of the interview, the petitioner was arrested. On May 3, 2004, he was indicted for Aggravated Murder.

After the indictment, witnesses came forward with heretofore unknown information and reported seeing the petitioner at the doors to the chapel during the very time frame in which the murder occurred. This information conflicted with petitioner's claim in 1980 and his statement in April of 2004 that he had never left his residence the morning of the homicide until he received a phone call that informed him of Sister Pahl's death.

The object used to stab Sister Pahl was of a unique shape. It left the bloody impression of its shape on the altar cloth with which the murderer covered the victim. Among the bloody impressions on the altar cloth was a nickel-sized, blood-stained imprint of the United States Capitol Building in Washington D.C. Next to the hilt of the letter opener, which had been recovered from Robinson's residence, was a nickel-sized medallion depicting the United States Capitol Building in Washington, D.C. The petitioner admitted that he never loaned the letter opener out and that his room was always locked.

During the trial eight witnesses gave testimony proving that the letter opener confiscated from petitioner's living quarters was used in Sister Pahl's murder.

In June of 2004, a forensic anthropologist examined the victim's mandible and observed a small diamond-shaped defect. The letter opener in question had an unusual four-sided blade which tapered to a point that was described as diamond-shaped. The coroner inserted the tip of petitioner's letter opener into the defect in the mandible, and it fit "perfectly." The coroner opined that petitioner's letter opener " . . . caused these injuries or a weapon exactly like this caused these injuries."

Additionally, two of the only five certified blood stain pattern experts in the world testified as to blood transfer patterns found on the altar cloth which covered Sister Pahl. Both of these experts found blood stains on the altar cloth which matched the size, shape, and outline of the uniquely shaped letter opener. The experts stated, with specific regard to the medallion depicting the U.S. Capitol Building which left its imprint on the altar cloth, that for any other object to have left that stain " . . . it would have had to have been basically the same shape, the same size, and the same configuration."

In 1980, Robinson told the police that the "killer" had confessed to him about the murder. When pressed, however, the petitioner admitted to making this story up to prevent suspicion upon himself. In 2004, the petitioner told police that he could not have gotten into the locked sacristy because he had no key to the door. Two nuns testified that Robinson had his own key to the sacristy because his duties required

almost daily entry to prepare for and conduct communion and other services in the adjoining chapel.

In 2004, the petitioner told police he was dripping wet from his morning shower when he answered the telephone and received news of Sister Pahl's murder. In 1980, Robinson told police he had already finished dressing when he answered the telephone and received the news of Sister Pahl's death.

In 2004, the petitioner repeatedly described his actions after being informed of Sister Pahl's death as quickly dressing from his morning shower and running to the chapel. However, when confronted with witness statements reporting hearing the sounds of running footsteps in the petitioner's hallway that morning prior to Sister's body being discovered, Robinson changed his story to say he could not run because of the length of his cassock.

Because the petitioner's letter opener was determined to be the murder weapon, access to his personal residence became a factor. In 2004, Robinson tried to convince police that he kept his door unlocked and that anyone could have entered his residence. He later conceded the fact that he kept his apartment locked.

Robinson became a suspect in part because of the report of the sound of "frantic" running footsteps in the hallway, where only he lived, during the time frame of the murder. The petitioner lived on the same level of the hospital as the chapel, but in a different structure called the Professional Building. On April 5,

1980, hospital employee Wardell Langston was cleaning the floor under the balcony in the Professional Building. Shortly after 7:30 a.m., Mr. Langston heard the loud footsteps of someone running on the floor above him, coming down the hallway which connected to the chapel. The footsteps made their way around the balcony above him to another connecting hallway. The footsteps went down the other hallway, at the very end of which was the apartment where the petitioner had been living for six years. It was in this apartment that the petitioner claimed to have been at the time of Sister Pahl's murder.

Moreover, the manner, circumstances, and setting for the murder were unusual to say the least. Sister Pahl's half-naked body had been placed in an unnatural position. Her legs were straight and together, her arms were straight by her sides, and her head was straight and looking up. The victim had clearly been posed.

Further, some of the thirty-one stab wounds were not made in a random fashion. Nine of them were so evenly spaced that they formed the shape of a cross. Additionally, although there were no wounds or scratches to her forehead, there was a bloodstain on her forehead, between her eyes, apparently caused by the killer anointing her with the blood-covered letter opener.

In an effort to determine if any of these facts and other circumstances at the scene had any significance, investigators contacted Father Jeffrey Grob,

an associate vicar of the Archdiocese of Chicago. As a result of his education, background, and employment, he was familiar with the rituals of the Catholic Church as well as other rituals not of Catholic origin.

It was Father Grob's opinion that Sister Pahl's killer would have had to have been someone with specialized knowledge of Catholic ritual, such as a religious sister, a seminarian, or a priest. Father Grob opined that much of what occurred to the victim was an attempt to mock and degrade her. At the time of the homicide, everyone in the hospital with such specialized religious knowledge was accounted for except for one person. Father Swiatecki, the other priest, was observed to be in the cafeteria at the time of the homicide. All the nuns also had their whereabouts accounted for by other witnesses. Only the petitioner's whereabouts could not be verified.

Testimony established that the petitioner was less than content working for the nuns at Mercy Hospital. The petitioner had twice asked permission to become a military chaplain. These requests were denied. The petitioner, in his taped interview, referred to Mercy as "their (the nuns') hospital" and that he "just worked there." Sister Pahl was described as "a perfectionist"; one who could be "very, very strict"; "very stern"; "things had to be done a certain way"; if not "then she would come and tell you." Having been a previous CEO of a major hospital, she was not hesitant to state her opinion. She was also described as very serious about her religion. The

petitioner himself described Sister Pahl as having a dominant personality.

In the two years between indictment and trial, petitioner filed multiple motions. He did not however, file a motion claiming his case was prejudiced as a result of the time period between the date of the crime and the date of indictment. This allegation was raised for the first time on direct appeal.

Prior to commencement of trial, the State amended the indictment to the lesser included offense of Murder. During the trial the defense specifically moved to have all investigative reports deemed ancient documents pursuant to Ohio Evidence Rule 803.16. The trial court granted that request, thereby making every written report containing a witness statement admissible, whether the person was available for trial or not.

The jury convicted petitioner of the sole count of Murder.

**B. The Ohio appellate court affirmed Robinson's conviction.**

On direct review, the Ohio court of appeals upheld Robinson's conviction and sentence. The Ohio Supreme Court later denied Robinson's appeal. Of greatest relevance to this petition, the appellate court found that petitioner had not suffered substantial actual prejudice to his case as a result of the delay between the crime and indictment.

**C. Misstatements of Fact.**

In compliance with U.S. Supreme Court Rule 15.2, the respondent identifies the following misstatements of fact contained in petitioner's Writ of Certiorari.

Contrary to petitioner's assertion that Sister Gordon testified to impeach Margaret Warren's 1980 account about hearing footsteps in the vicinity of petitioner's apartment, the fact of the matter is that the defense introduced Ms. Warren's 1980 statement to impeach Sister Gordon's account. The state never impeached Ms. Warren's account. In fact, the state accepted her statement in closing argument and explained why it implicated petitioner. Ms. Warren's entire statement was introduced into evidence, and the jury heard all the evidence and arguments on this subject. Although petitioner bemoans the fact that she did not testify live, he has not indicated a single piece of additional information Ms. Warren could have provided on this subject.

In this filing, petitioner seeks to relitigate the facts by attempting to expand the time frame of the murder in order to reassert his trial defense that the second hospital priest, Father Swiatecki, was the killer. Petitioner neglects to mention why Father Swiatecki could not possibly be the killer.

Sister Gordon had breakfast with Father Swiatecki in the nuns' dining room the morning of the murder. Sister Gordon accompanied Father Swiatecki out of the dining room when they had

finished their breakfasts. As they parted company, Sister Gordon walked straight down the hall from the dining room directly into the chapel. A short while after she entered the chapel, Sister Gordon unlocked the sacristy door and found the victim's body. After she parted company with Father Swiatecki, it would have been impossible for him to gain access to the chapel or the sacristy without being seen or heard by Sister Gordon or one of the other nuns who had entered the chapel. *Robinson* ¶194.

In reconstructing the evidence of the trial, petitioner attempts to incorporate two unofficial statements made by coroner Dr. Fazekas into her "official findings" even though they were made, in one instance, prior to the actual autopsy, and in the second instance, before the petitioner's dagger-shaped letter opener was recovered.

Prior to the autopsy, Dr. Fazekas noted bruising to the back of the victim's neck and told a detective she may have been strangled from behind by a man with large hands.[1] Dr. Fazekas later abandoned this off-the-cuff opinion after the autopsy was conducted. Her official report said nothing of manual strangulation which proper medical protocol would have required. More importantly, after the autopsy, she told the police that the killer could have been a male or

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[1] She also told the detective that an official conclusion would have to await the autopsy.

female. *Robinson* ¶¶31, 32, 133, and 134. (Citation omitted; *see* Appendix A-1.)

A pair of scissors normally kept in the chapel could not be located after the murder. The nuns gave police a sample pair of scissors which were generally similar in appearance to the scissors which could not be located. Dr. Fazekas was shown this sample pair of scissors before the police recovered petitioner's dagger-shaped letter opener. When inspecting the sample scissors, which were of a different size and shape (shorter and narrower) than a pair of scissors believed to have been missing from the sacristy, Dr. Fazekas stated that scissors might have caused some of the wounds to the victim, but clearly not all thirty-one of them because the wounds on the victim's face appeared to have been made with a weapon sharper than the scissors. *Robinson* ¶21. Since the sample scissors were different in size and shape than the "missing scissors," their unavailability has no relevance. Moreover, nowhere in the record is either pair of scissors described as sharp. Petitioner asserts this out of whole-cloth.

Dr. Fazekas never opined that the *missing* scissors "very well could have been the murder weapon" "[B]ut she would not say with 100% certainty," as petitioner states, because Dr. Fazekas never had the "missing scissors" to examine. In fact, Dr. Fazekas said a pair of scissors could only have caused *some* of the punctures, as many of the wounds were too sharp edged. *Robinson* ¶136. Once petitioner's dagger-shaped letter opener was found and shown to Dr.

Fazekas, her opinion was clear: Robinson's letter opener was compatible with *each* of the wounds found in the body and could have been the weapon used. *Robinson* ¶¶22, 137.

Additionally, the petitioner argues that, had Dr. Fazekas testified, she would have offered testimony "that would have wholly negated a finding of guilt on the critical element of identity." Petition, p. 29. To the contrary, Dr. Fazekas' autopsy report, her statement made after the autopsy about a man or woman being capable of committing the crime, and those statements made after examining petitioner's letter opener did not negate petitioner's guilt nor were they in any way exculpatory. The State used them against petitioner in its case in chief. Regardless of that, all of her statements, official or otherwise, were brought before the jury and used by both parties as they deemed fit. Anything more she could have said is mere speculation.

Petitioner claims that Dr. Fazekas was the only person with first-hand knowledge of the critical identifying dimensions of the stab wound. Dr. Fazekas took notes and wrote an autopsy report which covered every one of the wounds in detail. Had she testified at trial, the overwhelming probability is that she would have had to have relied on her detailed notes and autopsy report. The notes and autopsy report were in evidence and went to the jury.

## REASONS FOR DENYING THE WRIT

Robinson asks this Court to revisit its longstanding holdings in *United States v. Lovasco*, 431 U.S. 783 (1977) and, by extension, *United States v. Marion*, 404 U.S. 307 (1971), to enable him to set forth a claim that he failed to make in the trial court. In so doing, petitioner alleges that this Court has failed properly to articulate what constitutes "actual prejudice" in a pre-prosecution delay claim.

Robinson raised the argument that the delay between the commission of the offense and the bringing of the indictment resulted in substantial actual prejudice to his defense, not prior to trial, but for the first time on appeal. *Robinson* ¶¶91, 116, and 117. The Ohio appellate court, though noting this issue could be deemed to have been waived, reviewed it upon appeal and addressed it under the standards enunciated in *Lovasco* and *Marion*, *supra*, "not just because it [raised] a fundamental constitutional issue, but also because the issue raised forms the basis for appellant's claim of ineffective assistance of counsel." *Robinson* ¶117. Thus, this issue was afforded a full review upon appeal.

In challenging this Court's articulation of the two-part test in preindictment delay situations referenced in *Lovasco*, petitioner is actually asking this Court to revisit its holding in *Marion*, the decision in which this Court initially formulated its two-part test, not *Lovasco*. *Lovasco* stands for the proposition that prosecuting "a defendant following investigative

delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." *Supra*, at 796.

*Lovasco* recognized that:

> investigative delay is fundamentally unlike delay undertaken by the Government solely to gain tactical advantage over the accused. . . . Rather than deviating from elementary standards of 'fair play and decency,' a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. *Id.*, at 795.

Investigative delay is precisely what occurred in the present case.

**A. The court below followed correct procedure by exercising its judgment in a case specific manner.**

In attacking *Lovasco*'s "actual prejudice" standard, petitioner in reality attacks the underpinnings of *Marion* in which this Court found that the speedy trial provisions of the Sixth Amendment did not apply until defendants, in some way, were officially accused, an event in *Marion* that occurred only upon indictment. Because the preindictment delay did not extend beyond the period of the applicable statute of limitation and because the defendants showed no actual prejudice resulting from the delay, this Court

held that defendants' due process claims were speculative and premature. This Court held:

> However, we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution. To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case. *Supra*, at 324-25.

Thus, *Marion* recognized that a rigid, all encompassing definition of actual prejudice could not possibly anticipate every variable imaginable in a criminal case. An inflexible definition could never possibly account for "the circumstances of each case." *Id.*

However, case authority has shaped the contours of this issue. The defendant bears the burden of proving actual prejudice flowing from the preindictment delay. *United States v. Gouveia*, 467 U.S. 180, 192 (1984) (citing *Lovasco, supra*, at 789-90); *United States v. Marion, supra*, 404 U.S. at 324. To prove actual prejudice, a defendant must specifically identify witnesses or documents lost during delay properly attributable to the government. *See Lovasco*, 431 U.S. at 788-90; *United States v. Dennis*, 625 F.2d 782, 794 (8th

Cir. 1980); *see also United States v. Mills*, 641 F.2d 785, 788 (9th Cir.), *cert. denied*, 454 U.S. 902 (1981); *United States v. Tousant*, 619 F.2d 810, 814 (9th Cir. 1980). Speculative or conclusory claims alleging "possible" prejudice as a result of the passage of time are insufficient. *Marion*, at 325-26. The defendant also must establish the substance of the testimony which would be offered by the missing witnesses and how the information is material to the accused's defense. *See United States v. Page*, 544 F.2d 982, 985 (8th Cir. 1976); *United States v. Quinn*, 540 F.2d 357, 361-62 (8th Cir. 1976); *United States v. Mays*, 549 F.2d 670, 679-80 (9th Cir. 1977). Additionally, the defendant must show that the missing testimony or information is not available through substitute sources. *See United States v. Tempesta*, 587 F.2d 931, 933-34 (8th Cir. 1978); *see also United States v. Cederquist*, 641 F.2d 1347, 1352-53 (9th Cir. 1981). The loss of or impairment of memories does not constitute actual prejudice for purposes of the due process clause. *See Marion*, 404 U.S. 322; *United States v. Purham*, 725 F.2d 450, 453 (8th Cir. 1984); *United States v. Taylor*, 603 F.2d 732, 735 (8th Cir.), *cert. denied*, 444 U.S. 982, 62 L.Ed. 2d 410, 100 S. Ct. 487 (1979). In sum, the defendant must demonstrate that the delay actually impaired his ability to present a meaningful defense. *United States v. Solomon*, 686 F.2d 863, 872 (11th Cir. 1982); *Cederquist*, 641 F.2d at 1351.

This same rationale can be found in this Court's other decisions in which "prejudice" is a factor. In *United States v. Frady*, 456 U.S. 152 (1982), this Court

dealt with the issue of what standard of review applied on a collateral challenge to a criminal conviction under 28 U.S.C. §2255 as it related to an alleged faulty jury instruction. This Court found that the proper standard for review was enunciated in *Davis v. United States*, 411 U.S. 233 (1973) and later confirmed and extended in *Francis v. Henderson*, 425 U.S. 536 (1976), and *Wainwright v. Sykes*, 433 U.S. 72 (1977). In part, the standard formulated requires a convicted defendant to show "actual prejudice" resulting from the errors of which he complains. In reaffirming this standard, this Court noted that the test "requires that the degree of prejudice resulting from the instruction error be evaluated in the total context of the events at trial." *Frady*, at 169.

This Court has consistently recognized that a rigid, inflexible rule which specifies the exact "quantum of proof necessary to meet that threshold," as petitioner demands, is impractical. Prejudice can only be properly evaluated in the total context of the events at trial, *Frady*, at 164, because it will always "involve a delicate judgment based on the circumstances of each case." *Marion*, at 324-25. The *Marion* standard is properly anticipatory of the variables encountered in actual cases and should be retained and not replaced as petitioner argues.

### 1. There is no requirement to engage in a "balancing test" under *United States v. Marion*.

Petitioner suggests that there is a variation among the federal circuit courts as to how the *Marion/Lovasco* standard is applied. He correctly articulates that most federal circuit courts interpret the *Marion/Lovasco* tests as requiring a defendant first to prove that the delay caused actual prejudice to his defense and then that the prosecution had an improper motive for the delay designed to gain a tactical advantage or some other improper purpose.

Petitioner argues that the test first articulated in *Marion* and later acknowledged in *Lovasco* is flawed and should be rejected for a new standard under which the focus is on the Government's reasons for the delay. Petitioner notes that two of the federal circuits take such an approach. Their first prong is still "actual prejudice." If established, their second prong requires the court to balance the prejudice suffered by the accused under the first prong against the Government's justification for the delay. Petitioner prefers this latter standard, and he asks this Court to adopt this minority position to meet with his point of view.

What petitioner fails to point out to this Court, however, is that the Ohio Supreme Court in *State v. Luck*, 15 Ohio St. 3d 150 (1989), adopted the very interpretation that petitioner seeks to have this Court impose upon the federal circuits. The appellate court applied that decision in this case and found

petitioner wanting. Nonetheless, petitioner is asking this Court to change its established standard even though the change, if adopted, would not alter the outcome of his case.

In *Luck*, the Supreme Court of Ohio adopted the "actual prejudice" prong of the *Lovasco* decision. *Id.*, at 157-58. Once the defendant makes a showing of actual prejudice, Ohio law then shifts the burden to the state to prove that the reasons for the delay were justified. *Id.*, at 158. The Court then weighs the prejudice suffered by the defendant against the state's reasons for the delay to determine whether the delay resulted in a due process violation. *Id.*, at 154. Thus, Ohio courts employ, and the court of appeals in this case utilized, the very standard which petitioner seeks to have this Court mandate as the law of the land.

This Court recognized in *Marion* that "possible prejudice is inherent in any delay, however short; it may also weaken the Government's case." *Id.*, at 322 (footnote omitted). Both *Marion* and *Lovasco* emphasized that "the primary" protection against preindictment delay was the statute of limitations, and that the due process clause had but "a limited role to play." *Lovasco*, at 789. The only due process violation specifically recognized occurred when the delay not only "caused substantial prejudice . . . " but also " . . . was an intentional device to gain tactical advantage." *Marion*, at 324. *Marion* reversed the dismissal for preindictment delay stating, " . . . there is no showing that the Government intentionally delayed to gain

some tactical advantage over appellees or to harass them." *Id.*, at 325.

*Lovasco* rejects the notion that prejudice from preindictment delay is a sufficient, rather than merely a necessary, condition for relief. *Id.*, at 790, 795-96. It likewise rejected the contention that the due process clause proscribes delay beyond the time the prosecution has assembled sufficient evidence to prove guilt beyond a reasonable doubt. *Id.*, at 792-95. *Lovasco* refuses to proscribe investigative delay *because* such "delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused.'" *Lovasco*, at 795. Moreover, *Lovasco*, rather than remanding for reconsideration in light of its principles, flatly held that the dismissal of the indictment was error *despite* the findings of both the district court and the Court of Appeals that the delay not only caused actual prejudice to the accused but was also "'unjustified, unnecessary, and unreasonable.'" *Lovasco*, at 787. Indeed, both *Lovasco* and *Marion* indicate the undesirability of attempting to make such determinations. Finally, neither *Marion* nor *Lovasco* mentions any "balancing" or "weighing" of the extent of the prejudice against the relative merit of the reasons for the delay. The closest thing to a reference to balancing is *Marion*'s statement that limitations statutes "represent legislative assessments of *relative interests* of the State and the defendant." *Id.*, at 464. (emphasis added.)

This Court has reaffirmed this standard in *United States v. Gouveia*, 467 U.S. 180, 192 (1984), wherein this Court stated:

> But applicable statutes of limitations protect against the prosecution's bringing stale criminal charges against any defendant, *United States v. Lovasco*, *supra*, at 788-789; *United States v. Marion*, *supra*, at 322, and, beyond that protection, the *Fifth Amendment* requires the dismissal of an indictment, even if it is brought within the statute of limitations, *if* the defendant can prove that *the Government's delay* in bringing the indictment *was a deliberate device to gain an advantage over* him *and* that it caused him actual prejudice in presenting his defense. *United States v. Lovasco*, *supra*, 431 U.S. at 789-790, *United States v. Marion*, *supra*, 404 U.S. at 324. (emphasis added.)

Similarly, in *Arizona v. Youngblood*, 488 U.S. 51 (1988), this Court, in support of its holding that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law," stated, at 57, that

> Our decisions in related areas have stressed the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence attributable to the Government. In *United States v. Marion* (citation omitted), we said that '[n]o actual prejudice to the

> conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them.' *Id.* at 325, 92 S. Ct. at 466; *see also, United States v. Lovasco* (citation omitted).

Moreover, in *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555 (1983), this Court, in rejecting the Government's argument that the *Lovasco* standard should apply in a civil forfeiture situation, described the test to be employed for due process challenges to delay in instituting criminal prosecutions as follows:

> As articulated in *United States v. Lovasco* (citations omitted), such claims can prevail only upon showing that the Government delayed in seeking an indictment in a deliberate attempt to gain an unfair tactical advantage over the defendant or in reckless disregard of its probable prejudicial impact upon the defendant's ability to defend against the charges. *Id.*, at 563.

Thus, this Court has consistently held that the focus must be on the Government's intent when it comes to foreclosing the Government from its day in court in its efforts to prosecute crime.[2]

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[2] *See, e.g., United States v. Soto-Beniquez*, 356 F.3d 1, 25 (1st Cir. 2003) (discovery violations and improper statements did

(Continued on following page)

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not violate due process because defendant unable to show pre-indictment delay caused actual, substantial prejudice and that prosecution orchestrated delay to gain tactical advantage); *Denis v. Upstate Corr. Facility*, 361 F.3d 759, 760 (2d Cir. 2004) (claim that 77-month delay in obtaining indictment violated due process not valid because petitioner failed to show actual prejudice or deliberate delay to secure tactical advantage); *United States v. Beckett*, 208 F.3d 140, 151 (3d Cir. 2000) (claim that 6-month pre-indictment delay violated due process not valid because defendant unable to show prejudice or that prosecution orchestrated delay to gain tactical advantage); *Jones v. Angelone*, 94 F.3d 900, 911 (4th Cir. 1996) (claim that 10-year pre-indictment delay violated due process not valid because defendant suffered no actual prejudice and delay attributable to defendant's efforts to avoid extradition); *United States v. Avants*, 367 F.3d 433, 441-42 (5th Cir. 2004) (no due process violation surrounding conviction for aiding and abetting premeditated murder of victim in national forest because defendant did not show intentional delay for purpose of gaining tactical advantage or that delay caused actual, substantial prejudice); *Monzo v. Edwards*, 281 F.3d 568, 582 (6th Cir. 2002) (claim that 6-year pre-indictment delay violated due process not valid because defendant did not show delay was to gain tactical advantage or that defendant could have been identified sooner); *United States v. McMutuary*, 217 F.3d 477, 481-82 (7th Cir. 2000) (claim that nearly 5-year pre-indictment delay violated due process not valid because defendant failed to show actual substantial prejudice; defendant must allege more than mere speculative harm); *United States v. Grap*, 368 F.3d 824, 829 (8th Cir. 2004) (pre-indictment delay did not violate defendant's due process rights because he was not substantially prejudiced); *United States v. Gregory*, 322 F.3d 1157, 1165 (9th Cir. 2003) (claim that 17-month delay in bringing superseding indictment violated due process not valid because defendant failed to show actual prejudice); *United States v. Wood*, 207 F.3d 1222, 1235 (10th Cir. 2000) (claim that 4-year pre-indictment delay violated due process not valid because defendant failed to show definite rather than speculative prejudice).

There are multiple considerations which strongly militate against utilizing a "balancing test," as petitioner advocates, to determine whether prejudicial preindictment delay violates due process and in favor of requiring that the delay has been intentionally caused by the prosecution to gain a tactical advantage over the defendant or for some other bad faith purpose. Why a "balancing test," such as petitioner proposes, is unworkable was analyzed and rejected by the Fifth Circuit Court of Appeals in *United States v. Crouch*, 84 F.3d 1497 (5th Cir. 1996).

The court, in *Crouch, supra,* noted that a balancing test, such as proposed by petitioner, purports to weigh or balance the extent or degree of the actual prejudice against the extent to which the government's "good faith reasons" for the delay deviate from what the court believes to be appropriate. The Fifth Circuit Court recognized that:

> what this test seeks to do is to compare the incomparable. The items to be placed on either side of the balance (imprecise in themselves) are wholly different from each other and have no possible common denominator that would allow determination of which 'weighs' the most. Not only is there no scale or conversion table to tell us whether eighty percent of minimally adequate prosecutorial and investigative staffing is outweighed by a low-medium amount of actual prejudice, there are no recognized general standards or principles to aid us in making that determination and virtually no

body of precedent or historic practice to look to for guidance. Inevitably, then, a 'length of the Chancellor's foot' sort of resolution will ensue and judges will necessarily define due process in each such weighing by their own 'personal and private notions of fairness,' contrary to the admonition of *Lovasco*. *Supra*, at 1512.

The court went on to state:

Apart from the above difficulty, grounding a due process violation on the basis of good faith but inadequate, ineffective, or insufficient governmental personnel or management leading to preindictment delay runs counter to two basic constitutional principles. In the first place, 'historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property,' *Daniels v. Williams* (citation omitted), and hence 'the Due Process Clause . . . is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property.' *Davidson v. Cannon* (citation omitted). Contrary to these principles, however, [a balancing] test would find a due process violation where the government acted in good faith and did not deliberately seek to prejudice the party ultimately accused. *Supra*, at 1512-13.

*Crouch* also noted:

Finally, serious separation of powers concerns are implicated. Here, for example, the

panel concluded that the reasons for the delay 'lack of manpower and the low priority which this investigation was assigned' were 'insufficient to outweigh the actual prejudice to Crouch and Frye.' *Crouch*, at 483. Finding these reasons "insufficient" is in substance determining that greater manpower *should* generally have been allocated to investigation and prosecution in that jurisdiction, and that a higher priority *should* have been assigned to this particular investigation. Yet those decisions are ones essentially committed to the legislative and executive branches, and the case for judicial second guessing is particularly weak where it is directed at preindictment conduct and is supported not by any specific constitutional guaranty or by any long-established tradition of judicial oversight, but only by the general contours of the due process clause. *Supra*, at 1513.

Therefore,

[i]f all the manpower that could reasonably be expected has been furnished and the highest reasonably appropriate priority has been assigned to the matter in question, but a due process violation has nevertheless been found despite the delay's being caused only by the insufficient manpower and the relative priority assigned to the matter, then the due process violation must necessarily rest on prejudice alone, contrary to *Lovasco*. *Supra*, at note 19.

The Fifth Circuit Court of Appeals rejected a balancing test approach and held that for preindictment delay to violate the due process clause it must not only cause the accused substantial, actual prejudice, but the delay must also have been intentionally undertaken by the government for the purpose of gaining some tactical advantage over the accused in the contemplated prosecution or for some other impermissible, bad faith purpose.

In the present case, the record was not fully developed to explain the State of Ohio's reasons for the delay in bringing charges. This is because petitioner failed to raise this claim prior to trial and as such the State of Ohio was precluded from having the opportunity to create a complete record as to its actions through the years. However, enough facts can be gleaned from the record to clearly show that the delay was not a tactical construct designed to gain an unfair advantage at trial, but rather an investigative delay occasioned by the circumstances of the case. (*See* Respondent's Counterstatement p. 5).

*Lovasco* clearly established the principle that "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." *Id.*, at 796. This principle was followed in petitioner's case.

**2. Petitioner failed to establish prejudice.**

Under either version, the *Marion/Lovasco* test or the petitioner's newly proposed standard, it remains the defendant's burden to establish the first prong,

that is, that the delay caused substantial actual prejudice to the defense. In the present case, the state appellate court, in describing this first prong stated:

> If the defendant fails to meet his burden of establishing prejudice – that is, if the court determines that the missing evidence would not have significantly minimized or eliminated the impact of the state's evidence – the inquiry ends and the matter is concluded. *Robinson* ¶123.

In assessing the first prong of the test, the Ohio appellate court specifically cited to *Lovasco* noting, "To prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse in time." *Lovasco*, 431 U.S. at 796.[3]

The Ohio Sixth District Court of Appeals, after a thorough 17 page review of petitioner's claims as to any alleged prejudice found:

> . . . the evidence of appellant's guilt – including evidence showing that he was the person who committed the murder and that the instrument that he used to commit the murder was his sword-shaped letter opener –

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[3] In making this determination, the Ohio appellate court noted that some prejudice to a defendant occurring from evidence lost over the years does not deprive him of due process; rather, in order for a defendant to be deprived of due process, the prejudice must be substantial. *Robinson* ¶ 125, citing *State v. Walls*, 96 Ohio St. 3d 437 (2002).

> was very strong. And, in light of that evidence, we are compelled to conclude that any small amount of prejudice that may **arguably** have been suffered by appellant as the result of the missing evidence **(and based upon our analysis above, we do not find that there was any such prejudice)** did not constitute 'actual prejudice' . . . Because appellant has failed to meet his burden of establishing actual prejudice, we need not consider whether there was any justifiable reason for the delay in the prosecution of this case. *Robinson, supra*, at ¶¶161, 162. (emphasis added.)

As such, in this case, petitioner failed to meet his initial burden of proof of establishing substantial actual prejudice regardless of whether the longstanding *Marion/Lovasco* standard is applied, or if his newly proposed standard is applied. Therefore, the outcome of this case remains the same whether this Court ultimately finds in favor of the petitioner or the respondent.

Recognizing this reality, petitioner asks this Court to revisit the factual determinations made by the court below to serve as a predicate for this Court to justify establishing a new standard of review relative to the holdings of *Marion* and *Lovasco*, *supra*.[4]

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[4] State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process. In

(Continued on following page)

**B. The appellate court's opinion does not conflict with the Fifth or Sixth Amendment.**

Petitioner argues that the delay in this case prevented him from presenting a meaningful and complete defense. The reality is that the petitioner was, at most, prevented from offering a speculative defense in his case. This does not constitute a violation of his Due Process rights or his right to confrontation under the Sixth Amendment.

Petitioner cites this Court's ruling in *Holmes v. South Carolina*, 547 U.S. 319 (2006), which held that state evidentiary rules which arbitrarily excluded evidence of third-party guilt violated a criminal defendant's right to have "a meaningful opportunity to present a complete defense." *Holmes, supra*, at 331.

However, this Court in *Holmes*, *supra*, recognized that well-established rules of evidence may properly exclude probative evidence in many circumstances. This Court noted that while

> [t]he accused may introduce any legal evidence tending to prove that another person may have committed the crime with which he is charged. . . . [Such evidence] may be excluded where it does not sufficiently connect the other person to the crime, as, for

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fact, state courts often occupy a superior vantage point from which to evaluate the effect of trial error. *Brecht v. Abrahamson*, 507 U.S. 619, 636 (1993).

> example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial. *Supra,* at 327.

Petitioner's claims do not amount to actual prejudice. In analyzing his claims the Ohio appellate court framed the issue as follows: "To establish a claim of prejudice due to the unavailability of witnesses who would be able to testify on a defendant's behalf, the defendant must identify the missing witnesses and the subject matter of their testimony, and, further, must explain how the missing evidence has impaired his defense." *Robinson* ¶126.

In reviewing petitioner's claim of prejudice regarding the death of the original deputy coroner, the sample scissors, and the stab wounds, the appellate court provided a detailed analysis of why these claims failed to establish substantial actual prejudice. *See Robinson* ¶¶126-142. The appellate court also dealt with his claim of prejudice as to the death of his fall guy, Father Swiatecki, as well as Margaret Warren. ¶51-158. The appellate court, over the span of nineteen pages, consisting of forty-six paragraphs analyzing petitioner's claims, consistently found that they were "speculative, at best" ¶141; just "speculation" ¶144; and only "speculative, at best" ¶157.

As such, the lower court's decision did not deprive petitioner of "a meaningful opportunity to present a complete defense." *Holmes, supra,* at 331. Every

statement made by a witness that counsel sought to introduce into evidence went before the jury as a result of the ancient document ruling that petitioner obtained.

The only matters the jury did not hear from the deceased witnesses were what petitioner hopes he might have stumbled across if he had had the opportunity to examine these witnesses. This is the very essence of "speculative" evidence which *Holmes* recognized as properly excludable. "Such rules [excluding speculative evidence] are widely accepted, and neither petitioner nor his *amici* challenge them here." *Holmes, supra*, at 327.

This argument is clearly flawed and inconsistent with *Holmes*, *supra*, and should be rejected.

### C. This case is not of public or great general interest.

Ultimately, Robinson is asking this court to reassess the factual determinations made by the State appellate court. These claims are simply not of public or great general interest.

## CONCLUSION

For these reasons, the Court should deny the petition.

Respectfully submitted,

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No. 08-1188

Supreme Court, U.S.
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In The

# Supreme Court of the United States

GERALD ROBINSON,

*Petitioner,*

v.

STATE OF OHIO,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Court Of Appeals Of Ohio, Lucas County**

## REPLY TO BRIEF IN OPPOSITION

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## REPLY

The question presented in this case is straightforward: when does an accused suffer "actual prejudice" under the first prong of the test announced in *United States v. Lovasco*, 431 U.S. 783 (1977). In his opening papers, petitioner, Father Gerald Robinson, demonstrated that the lower federal and state courts cannot agree on the meaning of *Lovasco's* "actual prejudice" terms, and cannot agree on the burden of production and quantum of proof required to meet that constitutional threshold. *See*, Pet. at pp. 22-28. Thus, because the question presented has not been, but should be, settled by this Court, our Petition urges the Court to grant certiorari and clarify the meaning and parameters of the *Lovasco* standard.

In response to petitioner's actual prejudice certworthiness argument, the State embarks on a remarkable litigation strategy – it simply ignores it. Indeed, the Brief in Opposition does not even mention, let alone discuss, or distinguish any of petitioner's authority. Rather than grapple with the deep divide amongst the lower courts on the meaning of the terms "actual prejudice," the State characterizes petitioner's request for clarification of *Lovasco* as "disagreement" with *Lovasco*, and then re-casts that clarification request as one to "re-write" *Lovasco* and as an "attack" on *Lovasco*. *See*, Br. in Opp. at p. 1, p. 18.

None of these claims are true. The State cannot, and does not, contest our initial observation that the

parameters of a due process pre-prosecution delay claim are ill-defined. *See*, Pet. at pp. 22-28. And the State does not contest the fact that many *Lovasco* cases with similar facts produce inconsistent results. *Id.* Petitioner is asking this Court to clarify how a defendant alleging actual prejudice demonstrates that the prejudice suffered is not speculative, so that the lower courts can determine, based on "the circumstances of each case," whether the defendant has met that burden. Petitioner is not, as the State suggests, asking this Court to articulate a wide-sweeping, all-encompassing "inflexible rule" that is impractical for lower courts to apply. Simply put, clarification of the actual prejudice standard will guide and not foreclose lower courts from applying the case-by-case approach envisioned by *Lovasco*. To suggest otherwise. ignores the very nature of the due process inquiry.

Next, the Brief in Opposition does not quarrel with petitioner's claim that there is no constitutional remedy in the majority of the circuits in the absence of proof of prosecutorial misconduct. *See*, Pet. at pp. 20-21. But rather than address the cert-worthiness of this longstanding split of circuit court authority, the State launches into a tortured 14-page merit discussion of the second prong of the *Lovasco* test. *See*, Br. in Opp. at pp. 17-31. There, the State, in error, interprets this Court's decision in *United States v. Marion*, 404 U.S. 307 (1971), which dealt with the Sixth Amendment right to a speedy trial, as controlling this case, which instead deals with the Fifth Amendment

right to due process of law. *See*, Br. in Opp. at pp. 18-19.

Finally, unlike petitioner's Statement, which is meticulously supported with record citation to the lower court's findings of fact, *see* Pet. at pp. 2-18, the state of Ohio presents a "Counterstatement" of the case unsupported by any citations to the opinion below, and unsupported by any other essential record materials in an appendix. *See*, Br. in Opp. at pp. 2-12.[1]

Stripped to its essence, the Brief in Opposition presents only two arguments material to the certiorari determination – a suggestion of procedural bar and harmless error. As we explain below, these fact-driven arguments are meritless. But they do underscore why this is the right case to clarify the first prong of the *Lovasco* test.

**A. Father Robinson's due process claim is properly before this Court.**

Conceding that the question presented in this case was afforded "a full review on appeal," the State implies that the due process claim nevertheless was not preserved at the trial level. *See*, Br. in Opp. at p. 17. This claim is without merit.

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[1] The State's accusations that petitioner has misstated the record are themselves unsupported by the record, and are otherwise unworthy of a further reply.

This Court recently addressed and settled the procedure for raising a federal claim in a state-court proceeding. In *Baldwin v. Reese*[2] the Court advised that a "litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or . . . by simply labeling the claim 'federal.'" While the issue in *Baldwin* arose in the habeas context, the same rule of law applies to direct appeals.[3]

As we stated in the Petition, *see* p. 17 n. 11, Father Robinson's lawyers asked the trial court to dismiss the indictment, due to the loss of evidence in a pre-trial motion. In their motion and supporting brief, counsel requested that the court dismiss the charges because "defendant's due process rights have been violated." *See*, Pet. App. at B-4. While trial counsel ineptly relied upon the wrong line of due process cases, *see id.* at B-6, the factual basis for the motion was that exculpatory evidence, unavailable elsewhere, was lost due to the passage of time. Nothing more was necessary to present the federal claim in the first instance.

The trial court's treatment of the motion and the appellate court's review further demonstrate that this issue was properly preserved. The trial court

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[2] 541 U.S. 27, 32 (2004).

[3] *Howell v. Mississippi*, 543 U.S. 440, 442 (2005).

conducted an evidentiary hearing on the due process claim, and denied petitioner's request to dismiss the indictment, citing an Ohio case interpreting *Lovasco*. *See*, Pet. at p. 17, *see also*, Pet. App. at B-5. On direct appeal petitioner assigned the due process question as error. *Id.*, A-47 at ¶ 108. And he maintained that the claim was preserved, but ineffectively articulated by trial counsel. *Id.*, at ¶ 109. There, the State argued waiver. *Id.*, A-48, 49 at ¶ 117. But the Ohio appellate court rejected the waiver argument, and squarely addressed the *Lovasco* claim on its merits. *Id.*

Furthermore, the State does not claim that the presentation below violated any state procedural rules, and the judgment below contains no "plain statement"[4] that it relied upon anything but this Court's opinion in *Lovasco*. Therefore, the question of when, in *Lovasco's* terms, a pre-prosecution delay claim is "ripe for adjudication" is properly before this Court.

**B. Constitutional prejudice is manifest when the passage of time and the consequent loss of exculpatory evidence contribute to a conviction.**

Long on adjectives and short on nouns, the Brief in Opposition attempts to convince this Court that the prejudice suffered in this case was harmless, because the evidence of guilt was "very strong" and

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[4] *Cf. Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

because some of the lost evidence made its way to the jury in the form of hearsay. *See*, Br. in Opp. at pp. 31-36. The State's "no prejudice" analysis fails for two straightforward reasons. *First*, it misinterprets the harmless error standard.[5] *Second*, it does not address the inherent difference between hearsay declarations and live testimony or the relative probative impact of each upon a jury.

### 1. The State's Brief in Opposition misinterprets the harmless error standard.

The Brief in Opposition goes to great lengths to discuss only the incriminating evidence, without any citation to the lower court's factual findings, and it construes that evidence in a light most favorable to the State. *See*, Br. in Opp. at pp. 2-12. But constitutional harmless error analysis requires a more searching analysis than that. The question this Court must answer, in determining if harmless error is present, is whether "there is a reasonable possibility that the [error] complained of" – in this case, the prejudice caused by the 24-year delay in prosecution – "might have contributed to the conviction."[6] Indeed, "to say that an error did not contribute to the verdict . . . is to find that error unimportant in relation to

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[5] *See Chapman v. California*, 386 U.S. 18 (1967); *Crane v. Kentucky*, 476 U.S. 683 (1986) (an error is harmless if it is established beyond a reasonable doubt that it did not contribute to the verdict).

[6] *Yates v. Evatt*, 500 U.S. 391, 403 (1991).

everything else the jury considered on the issue in question."[7]

Accordingly, under the State's analysis, the question is whether the lost or destroyed evidence in this case was unimportant in relation to everything else the jury considered. Given that the cornerstones of the State's case were a second autopsy of a decomposed body that occurred 24 years after-the-fact, and negative inferences about the Catholic faith and the occult, *see* Pet. at pp. 12-15, the answer to this question is a resounding "no."

**2. The lost or destroyed evidence in this case significantly contributed to Father Robinson's conviction.**

The Brief in Opposition urges the Court to deny the writ, on the basis that Father Robinson suffered no constitutional prejudice, because his lawyers presented 12 pieces of paper to the jury. In essence, the State claims that use of hearsay declarations are sufficient to replace live expert testimony, live occurrence witness testimony, and key forensic and physical evidence. But nowhere does the State discuss the inherent difference between hearsay declarations and live testimony or the relative probative impact of each upon a jury.

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[7] *Id.* at 403.

As we stated in the Petition, the State's case against Father Robinson was entirely circumstantial, and the only issue at trial was the identity of the murderer. Suffice it to say, that Father Robinson's guilt or innocence turned upon his ability to rebut the four key components of the State's theory of identity: Father Robinson's letter opener as the murder weapon, soft ligature strangulation, a time of death before 7:30 a.m., and an intentional occult-like sexual assault. *See*, Pet. at pp. 4-7.

Here, Dr. Fazekas' live expert testimony, the stab wounds and sample scissors she examined in 1980 and Ms. Warren's live testimony were much more important to Father Robinson's defense than the hearsay declarations that were before the jury. Due to the absence of this live testimony, the jury had no means to determine the credibility of Dr. Fazekas or Ms. Warren or the credibility of their 1980 hearsay declarations under the court's standard jury instruction. What is more, the jury could not evaluate the reliability of the State's witnesses who offered evidence that contradicted what the dead witnesses would have said. And because of the deaths of Fazekas and Warren, the decomposition of the victim's body, and the loss of the sample scissors Fazekas examined in 1980, there was no way for the defense to independently verify the 26 year-old hearsay declarations at trial in 2006.

Making matters much worse, once the State impeached the lost evidence at trial and thus, put its reliability directly in issue, rehabilitation was a

factual impossibility. Indeed, the very fact that the defense was forced to rely upon testimonial hearsay, *see* Pet. at pp. 15-16, created an unbelievable reverse *Crawford* scenario,[8] where the State could contradict the hearsay declarations without any fear of rehabilitation. Consequently, the 12-page hearsay defense presented in this case was neither meaningful nor complete in a constitutional sense. Indeed, the jury could only speculate about the exculpatory value of the missing evidence.

Underscoring the grave danger of jury speculation here, and the need for Dr. Fazekas[9] and Ms. Warren's live testimony at trial, one need only look to the opinion below. There, the Ohio appellate court viewed Dr. Fazekas' opinions as not "necessarily exculpatory," *see* Pet. App. A-56 at ¶ 134, and Ms. Warren's time of death account as "a matter of debate." *Id.*, A-8, A-9 at fn. 4. While this type of speculation is what *Lovasco* forbids a defendant to engage in, it does explain why reliance upon hearsay, 26 years after-the-fact, is constitutionally dangerous. Surely, if three seasoned appellate judges speculated about Dr. Fazekas' 1980 post-mortem examination of

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[8] *Cf. Crawford v. Washington*, 541 U.S. 36 (2004); *Melendez-Diaz v. Massachusetts*, 557 U.S. ___ (2009).

[9] *Cf. United States v. Graham*, 128 F.3d 372 (6th Cir. 1997) (recognizing the significance of the live testimony of a deceased deputy coroner, where the Coroner's trial testimony is presented by a person who did not examine the body, and finding "substantial prejudice" in a Sixth Amendment case).

the body and the forensic and physical evidence she deemed material to her analysis, and further speculated about Ms. Warren's contemporary time of death account, then it is just as reasonable to conclude that the jury engaged in the same guesswork. If so, then expert witness testimony, occurrence witness testimony, forensic evidence, and physical evidence that undermined the State's weak circumstantial case, *see* Pet. at p. 11, was without meaning.

Therefore, the prejudice that resulted from the near quarter of a century of delayed justice here cannot be "harmless" beyond a reasonable doubt.

### C. This record provides the Court with an opportunity to establish a meaningful constitutional standard.

If the record in this case makes anything clear, it is that Father Robinson had no choice but to rely upon hearsay evidence in order to attempt to prove his innocence. *See*, Pet. at pp. 15-16. Indeed, the Brief in Opposition relies heavily upon the fact that some of the lost evidence made its way to the jury in the form of hearsay. *See*, Br. in Opp. at pp. 1, 16, 35-36. But the very fact that favorable hearsay is of record, will require this Court to adopt the type of probative value standard necessary to distinguish between "actual prejudice," which triggers the Due Process Clause, and speculative prejudice, which does not. And here, unlike the situation faced by the *Lovasco* Court, that standard and the "prejudice at trial"

requirement of *Lovasco* are capable of ready determination from a trial record and not a pre-trial record. Indeed, the introduction of hearsay, which differentiates this record from all others, establishes its cert-worthiness.

## CONCLUSION

The question of when a due process claim is ripe for adjudication, under *United States v. Lovasco*, 431 U.S. 783 (1977), has not been, but should be, settled by this Court. The confusion below, the due process interests that this case exemplifies, and the contemporary recurring litigation impact of "cold-case" prosecutions, warrant this Court's answer.

Accordingly, we urge the Court to grant certiorari and squarely confront the meaning and scope of *Lovasco*. Indeed, it seems irresponsible to let the chaos continue.

Respectfully submitted,

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